No. [redacted] 160

12974

Office Supreme Court, U.S.
FILED
JUN 3 1957
JOHN T. FEY, Clerk

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CHARLIE E. MAY,
Plaintiff-Appellant

vs.

ELLIS TRUCKING CO., INC.,
A Corporation,
Defendant-Appellee

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE

APPENDIX

FILED
NOV 29 1956
CLERK U. S. COURT OF APPEALS

CLARENCE CLIFTON
JOHN B. MACK
Attorneys for Plaintiff-Appellant
1814 Exchange Building
Memphis, Tennessee

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RELEVANT DOCKET ENTRIES

Sept. 12, 1955—Filed Complaint

Sept. 12, 1955—Filed $250.00 cost bond, John B. Mack, Surety

Oct. 6, 1955—Filed answer of defendant

Oct. 7, 1955—Filed Motion of plaintiff to strike

Oct. 14, 1955—Filed Order on Motion to Strike — Motion sustained

Feb. 29, 1956—Filed Stipulation

Feb. 29, 1956—Filed Motion for Leave to Amend Complaint

Feb. 29, 1956—Filed Order granting leave to amend Complaint

March 15, 1956—Filed Jury Verdict in favor of plaintiff
$42,500.00 personal injury, and
$1,110.00 property damage

March 16, 1956—Filed Judgment on Jury Verdict

March 22, 1956—Filed Charge of Court by Court Reporter

March 22, 1956—Filed Motion for New Trial by defendant

May 8, 1956—Filed Order overruling Motion for New Trial and directing Remittitur and final judgment —Jury Verdict reduced to $25,000.00

June 4, 1956—Filed Notice of Appeal

RELEVANT DOCKET ENTRIES (Continued)

June 4, 1956—Filed $250.00 appeal bond, John B. Mack, Surety

June 12, 1956—Filed Deposition of Dr. Robert Raskind

June 12, 1956—Filed transcript of evidence in 1 volume

June 12, 1956—Filed Reporter's transcript of Argument on Motion for New Trial

June 12, 1956—Filed Reporter's transcript of Ruling of Court on Motion for New Trial

June 20, 1956—Filed Stipulation of Parties as to Omission of Original Papers

June 20, 1956—Filed Stipulation of Parties as to transcript of Testimony

June 20, 1956—Filed Motion for Order of Disbursement

June 29, 1956—Filed Order of Disbursement

June 29, 1956—Filed Order, Extending Time for Filing Record and Docketing Appeal to September 1, 1956

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF TENNESSEE

WESTERN DIVISION

CHARLIE E. MAY ..... *Plaintiff*

vs

CIVIL ACTION
No. 2743

ELLIS TRUCKING CO., INC.,
a Corporation ..... *Defendant*

COMPLAINT

Fild September 12, 1955

Comes now the plaintiff, Charlie E. May, and sues the defendant, Ellis Trucking Co., Inc., for damages in the amount of Seventy-Eight Thousand ($78,000.00) Dollars and for his cause of action, alleges as follows:

I.

The plaintiff is now and was during all the times hereinafter set forth an adult resident of Memphis, Shelby County, Tennessee. The defendant, Ellis Trucking Co., Inc., is now and was during all the times hereinafter set forth, a foreign corporation doing business in Tennessee with branch offices in Memphis at 1334 North Second Street.

II.

Jurisdiction is founded upon diversity of citizenship between the parties and amount, the matters in controversy

exceeding, exclusive of interest and costs, the sum of Three Thousand ($3,000.00) Dollars.

III.

During all the times hereinafter set forth, John Reed Pruett, was employed by the defendant, Ellis Trucking Co., Inc., as the driver of its truck involved herein, and, upon the times and occasions herein alleged he was said defendant's agent, servant and employee and was on its business and in its employ. All of the allegations herein with respect to the recklessness and carelessness of the said John Reed Pruett and all resulting damages and injuries inflicted upon the plaintiff apply with equal force to the defendant as principal, master and employer through its agent, servant and employee.

IV.

On July 13, 1955, at approximately 3:30 in the afternoon, the plaintiff, Charlie E. May, who was in the careful and lawful operation of his 1954 four-door Ford automobile, was seriously, grievously, painfully and permanently injured as will be later shown, by the acts of gross negligence, recklessness and carelessness of the defendant, through its agent, servant and employee, John Reed Pruett, as hereinafter set out in more detail.

On the date and about the time stated above plaintiff had proceeded Southwardly to a position on South Third Street in Memphis, Tennessee, at about its intersection with Lucy Street where he was lawfully stopped behind a Plymouth automobile whose driver had indicated to plaintiff that he was going to make a left turn onto Lucy Street. At about this same time, and while the plaintiff was so stopped, the defendant, through its agent and employee, driving a 1952

International Tractor-Trailer Truck with 1955 Indiana license plate No. 33-314 Southwardly along said Third Street, without warning of any kind, with no attempt to stop or avoid a collision, at an excessive rate of speed under the circumstances prevailing, and in complete disregard for the lives of others and particularly of plaintiff, crashed into the automobile in which the plaintiff was sitting stopped behind this Plymouth automobile, knocking plaintiff's automobile into the one in front of him and off to the left some 150 feet into the driveway of the National Cylinder Gas Company, virtually demolishing his said automobile and severely and permanently injuring the plaintiff as more particularly set out hereafter.

Plaintiff charges that the defendant, through its agent, servant and employee, was negligent in driving said truck in such a reckless manner and at such an excessive rate of speed as to endanger the life, limb and property of the plaintiff; was grossly negligent in not keeping a proper look-out ahead and in failing to use reasonable and ordinary care to avoid a collision with others lawfully and properly using said street; was negligent in not keeping said truck under proper control; was negligent in not keeping said truck under such control that it could be stopped readily and easily to avoid this collision with the plaintiff who was in the proper use of said street; was negligent in failing to stop the truck and prevent the accident when the danger of same became or should have become apparent to it, its agent, servant and employee, in the exercise of reasonable and ordinary care; and was negligent in following too closely and in not yielding the right-of-way to the plaintiff, when it saw and knew, or by the exercise of reasonable and ordinary care

should have seen or known, that its negligence would cause an accident and the resulting injuries to the plaintiff.

Plaintiff further charges that the defendant, through its agent, servant and employee, was negligent in exceeding a reasonable speed under the circumstances prevailing at the time; was negligent in exceeding such a rate of speed as prevented it from avoiding the injuries and damages to plaintiff who was in the lawful use of the street and who was seen, or in the exercise of reasonable and ordinary care should have been seen by the defendant, its agent, servant and employee, for a considerable distance prior to the collision.

All of the aforesaid acts of negligence on the part of the defendant, through its agent, servant and employee were in direct violation of the common law and statutes of the State of Tennessee and the ordinances of the City of Memphis.

V.

As a direct and proximate result of the gross negligence, recklessness and carelessness of the defendant, through its agent, servant and employee, as charged above, and from the extreme force of the impact of the collision, the plaintiff, Charlie E. May, suffered extreme nervous shock and was severely and permanently injured about his legs, chest, body, back and spine. Plaintiff suffered considerable muscle spasm and restriction of motion in the lumbar area of his back, an acute low-back strain with associated intervertebral disc and vertebrae injuries and he has had and is having severe pain and soreness throughout his entire body since the date of this accident and particularly in his lower back and legs. As a direct result of these injuries and the defendant's negligence, the plaintiff was hospitalized where

he underwent painful treatment with traction and operative examinations, showing no particular improvement, and he has been required to wear a back-brace and has been advised that in all probability he will be required to have a serious and painful operation in the future for the condition resulting to his spine, vertebraes, and discs in his back. The plaintiff has had and is now having almost continuous pain in his spine and legs; he cannot straighten up; and he has suffered and still suffers from numbness and loss of power in his legs.

As the direct and proximate result of the acts of negligence, recklessness and carelessness on the part of the defendant, through its agent, servant and employee, and the injuries sustained by the plaintiff, the plaintiff has suffered in the past and will continue to suffer in the future considerable severe physical and mental pain and anguish and, in all probability, will require further hospitalization and future painful, extensive and expensive medical treatment, including operative procedure. All of the aforesaid injuries are permanent and will permanently disable the plaintiff. All of the said mental anguish and physical pain, suffering, nervousness, injuries, hospitalization, damages and permanent disabilities were the proximate result of each and every act of the defendant's aforesaid gross negligence.

WHEREFORE, Plaintiff sues the defendant for damages in the sum of Seventy-Five Thousand ($75,000.00) Dollars and demands a jury to try the issues when joined.

VI.

The plaintiff, Charlie E. May, reiterating, repeating and re-alleging each and all of the paragraphs set out herefo-

fore, the same and with like effect as if fully repeated herein alleges that the defendant, through its agent, servant and employee, was negligent and guilty of reckless disregard for the safety of the lives, limbs and property of others, and particularly of the plaintiff in violating the following ordinances of the City of Memphis, which were in full force and effect at the date and time of this accident:

"Section 1673. FOLLOWING TOO CLOSELY.—The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard to the speed of such vehicle and the traffic upon and condition of the highway. (1931, Sec. 807.)

"Section 1682. RECKLESS DRIVING.—Any person who drives any vehicle upon a street recklessly or at a speed, or in a manner so as to endanger or be likely to endanger the life, limb or property of any person shall be guilty of reckless driving. (1931, Sec. 816.)

"Section 1685. SPEED LIMIT FOR TRUCKS.—No trucks or vehicles designed for carrying freight and merchandise of one ton capacity or over shall be driven at a greater rate of speed than twenty miles per hour. (1931, Sec. 819.)"

As a direct and proximate result of the gross negligence and recklessness of the defendant, through its agent, servant and employee, in violating each and every one of the aforesaid ordinances of the City of Memphis the plaintiff was seriously, painfully and permanently injured as set out heretofore.

WHEREFORE, Plaintiff sues the defendant for damages

in the additional sum of Seventy-Five Thousand ($75,000.00) Dollars and demands a jury to try the issues when joined.

VII.

The plaintiff, Charlie E. May, reiterating, repeating and re-alleging each and all of the paragraphs set out heretofore the same and with like effect as if fully repeated herein alleges that the defendant, through its agent, servant and employee, was grossly negligent and guilty of reckless disregard for the safety of the lives, limbs and property of others and particularly of plaintiff in violating the following statute of the State of Tennessee, which was in full force and effect at the date and time of this accident:

> "Section 2700.2. LAWFUL SPEED; RECKLESS DRIVING; STARTING, STOPPING OR TURNING.—
>
> (a) Any person driving a vehicle on a highway shall drive the same at a careful speed not greater nor less than is reasonable and proper, having due regard to the traffic, surface and width of the highway and of any other conditions then existing. Any person who shall drive any vehicle upon a highway recklessly, at such a speed or so as to endanger, or be likely to endanger the life, limb, or property of any person, shall be guilty of reckless driving, and any person who shall drive any vehicle upon a highway so as to unnecessarily block, hinder or retard the orderly and safe use of the highway by those following, or so as to cause congestion on the highway, shall be prima facia guilty of reckless driving.

". . . . (c) Reckless driving within the meaning of this section shall be deemed to include the following offenses, which are expressly prohibited.

"First: Driving a vehicle when not under complete control, or with inadequate or improperly adjusted brakes.

"* * * * *

"Sixth: Exceeding a reasonable speed under the circumstances and traffic conditions obtaining at the time."

As the direct and proximate result of the gross negligence and recklessness of the defendant, through its agent, servant and employee, in violating the aforesaid statute of the State of Tennessee the plaintiff was seriously, painfully and permanently injured as set out heretofore.

WHEREFORE, Plaintiff sues the defendant for damages in the additional sum of Seventy-Five Thousand ($75,000.00) Dollars and demands a jury to try the issues when joined.

VIII.

The plaintiff, Charlie E. May, repeating and re-alleging each and all of the allegations contained in Paragraphs I through VII of this Complaint the same and with like effect as if fully repeated herein, charges that as a direct and proximate result of the gross negligence, recklessness and carelessness of the defendant, through its agent, servant and employee, in violation of the common law and statutes of the State of Tennessee and the ordinances of the City of Memphis, his four-door 1954 Ford Sedan was virtually demolished. Plaintiff alleges that he was obliged to purchase

a new automobile to replace the one that he had and because of his financial status, he had to finance it and has incurred finance and carrying charges and insurance charges that he would not otherwise have had. Plaintiff further charges that his automobile is used in his business and that there was considerable delay in obtaining a new automobile for him and he was thereby damaged by loss of use of his automobile.

WHEREFORE, Plaintiff sues the defendant for property damages in the additional and separate sum of Three Thousand ($3,000.00) Dollars and demands a jury to try the issues when joined.

CLARENCE CLIFTON

JOHN B. MACK

Attorneys for Plaintiff

(Item 1 p. 1-8)

ANSWER OF DEFENDANT
Filed October 6, 1955

The defendant admits the allegations contained in numbered paragraph I of the complaint, admits diversity of citizenship, and admits the plaintiff is suing for more than $3,000.00.

The defendant admits that John R. Pruett was at the time and place in question the agent of the defendant and was on and about the business of the defendant.

The defendant denies all of the allegations of negligence contained in the declaration as fully and completely as though each allegation was copied separately herein.

The defendant denies that it or its agent and servant violated any of the city ordinances or State statutes set out in the complaint, and denies that it or its agent or servant was guilty of any negligence of any kind or nature which proximately caused or contributed to the accident or the plaintiff's injuries or damages if any he received.

The defendant denies that the plaintiff was injured in the manner or to the extent alleged in the complaint and denies that the plaintiff was injured or damaged to any extent as a result of any negligence on the part of the defendant or its agent .

The defendant denies that the plaintiff's property was damaged to the extent alleged and further in this connection alleges that the plaintiff had in effect a policy of collision insurance on his automobile at the time this accident occurred and that he has made claim against and has collected from his insurance company for the damage to his automobile, which actually amounted to only $857.50; that the

plaintiff has assigned his cause of action for the damage to his property to his insurance company, the Houston American Insurance Company, and, therefore, is not a proper party plaintiff insofar as said property damage is concerned. Defendant would further show that the Houston American Insurance Company is not a resident of the district in which this Court sits and that, therefore, the controversy between the Houston American Insurance Company and this defendant would not be properly venued in this Court.

The defendant alleges that at or about the time and place mentioned in the complaint its truck, being driven by its agent, John R. Pruett, was proceeding South on South Third Street at a very slow rate of speed and in a careful, cautious and prudent manner. That the plaintiff who was driving his automobile in the same direction in front of the defendant's truck suddenly and without any warning or signal stopped his automobile in the path of the defendant's truck in such a manner that the said Pruett was unable to stop in time to avoid colliding with the left rear of the plaintiff's automobile. The defendant, therefore, alleges that the plaintiff was guilty of negligence which directly and proximately contributed to the collision and the plaintiff's own injuries and damages if any he sustained.

WHEREFORE, the defendant prays that the complaint be dismissed and that the defendant go hence with its reasonable cost.

NELSON, NORVELL & FLOYD
1001 Columbian Mutual Tower
Memphis, Tennessee
Attorneys for Defendant

Motion for Leave to Amend Complaint

I, Ferber S. Floyd, one of the attorneys for the defendant, certify that I this the 6th day of October, 1955, mailed a copy of the foregoing answer to Clifton & Mack, Attorneys for plaintiff, addressed to them at their offices in the Exchange Building, Memphis, Tennessee.

FERBER S. FLOYD

(Item 2 p. 1-2)

MOTION FOR LEAVE TO AMEND COMPLAINT

Filed February 29, 1956

Plaintiff moves the Court, under Rule 15, Federal Rules of Civil Procedure for leave to amend his Complaint in the following particulars:

1. By amending Section V of Plaintiff's Original Complaint by adding after the second paragraph thereof and immediately preceding the ad damnum paragraph the following:

> "As the direct and proximate result of the acts of negligence, recklessness and carelessness on the part of the defendants, its servant, agent and employee, and the impact of the collision aforesaid and the injuries received therefrom, the plaintiff, Charlie E. May, continued to suffer sharp pain and irritability in his low back area, there was an increased flattening of his normal lumbar curve and he had marked paravertebral

muscle spasm. As a necessary and direct result of these injuries the plaintiff was hospitalized where he underwent painful surgery on his lower back and around his spine and spinal cord for the removal of herniated nucleus pulposis at the level of L4 and L5. Thereafter, plaintiff remained in the hospital for a lengthy period of time, was disabled and prevented from working at his normal occupation and was deprived of the ability to pursue his normal activities in business and family life. As the direct and proximate result of the defendant's negligence through its servant, agent and employee, plaintiff has suffered a permanently disabling injury which has diminished greatly his normal activities, earning power and capability, and general enjoyment of life."

2. By amending the ad damnum paragraphs in each Section of plaintiff's Original Complaint to increase his compensatory damages to One Hundred Thousand ($100,000.00) Dollars with the exception of Section VIII which is decreased to read Eleven Hundred Ten ($1110.00) Dollars.

The grounds for this motion are that justice requires that all issues may be fully litigated in this action; that since the filing of the Original Complaint, plaintiff has been advised of the most serious nature of his injuries and has had to undergo dangerous and painful surgery on his lower back; and plaintiff's demand for damages as previously stated is inadequate.

CLIFTON & MACK
By JOHN B. MACK
Attorneys for Plaintiff

(Item 4 p. 1-2)

ORDER GRANTING LEAVE TO AMEND COMPLAINT

Filed February 29, 1956

This cause came on to be heard upon Plaintiff's motion under Rule 15, Federal Rule of Civil Procedure for leave to amend his Original Complaint in accordance with the amendment set forth in his written motion, and this appearing to the Court proper,

IT IS HEREBY ORDERED AND ADJUDGED that Plaintiff be, and he is hereby permitted to amend his Complaint in accordance with the amendments set forth in his written motion on file in this cause, and the same shall be treated for all purposes as a part of his Original Complaint in this action.

Dated this 29 day of February, 1956.

MARION S. BOYD
Judge.

(Item 5 p. 1)

Testimony of Charlie E. May — Direct

BE IT REMEMBERED that the above-entitled cause came on to be heard on this, the 14th day of March, 1956, et seq., at nine-thirty o'clock, a. m., before the Hon. Marion S. Boyd, Judge, presiding, and a jury duly selected, sworn and impaneled to try said cause, satisfactory to counsel for plaintiff and counsel for defendant, when and where the following proceedings were had, to-wit: (Tr. p. 1) * * *

DIRECT EXAMINATION

BY MR. MACK:

Q You are Mr. Charlie E. May?

A That's right.

Q You are the plaintiff in this lawsuit?

A Yes, sir.

Q Where did you just get out of this morning, Mr. May?

A Saint Joseph's Hospital.

Q And how long have you been there?

A Since—, well, on and off for about three months, but I went in last Friday.

Q When this trial is concluded, where are you supposed to go?

A Back to the hospital.

Q Did you see Dr. Raskind today?

A Yes.

Q Did he permit you to come down here?

A For the trial.

Q Just for the trial?

A Yes.

Q Speak a little louder.

A To report back.

Q You are to report back?

A Yes.

Q How old are you, Mr. May?

A Twenty-eight.

Q Are you married?

A Yes.

Q Do you have any children?

A Three.

Q How old are your children?

A Six, four and two and one half months.

Q When was the baby born?

A December 20, 1955.

Q Was that shortly after you had this operation?

A Yes—, no, that was before.

Q When was the baby born?

A Right after the operation, that's right.

Q Were you able at that time to drive your wife to the hospital?

A No, sir, I was in the hospital.

Q Mr. May, by whom are you employed?

A Graybar Electric Company.

Q How long have you been employed by them?

A Approximately nine years.

Q And had you held any jobs before that, any major jobs?

A No; I had some kid jobs, like working in the drug store and restaurants and things like that after school, but no major jobs.

Q What position in Graybar did you first go into?

A I started in the warehouse, packing boxes.

Q Do you recall what salary you started making at that time?

A $136.00 a month.

THE COURT: Raise your voice a little bit, please.

Q Raise your voice a little bit so that we can hear you back here, and the jury can hear you. I believe you said $136.00 a month?

A That's right.

Q Do you recall the next job you had?

A Well, from there I started to work at different jobs in the warehouse, ordering, selecting, receiving clerk, city clerk, receiving counter and supply sales, and sales.

Q All of your work then has been at different jobs going towards salesman?

A That's right.

Q Have you had increases in salary during this period of time?

A That's right; it is about double.

Q Now, what is your exact position with Grayba right now?

A I am salesman now.

Q What territory are you supposed to cover?

A I have certain assigned accounts that I cover in the City of Memphis, mostly electrical contractors.

Q How long have you been in that position?

A Approximately four to five years.

Q During the course of that time as salesman on the city accounts, have your earnings increased?

A Very definitely.

Q Do you recall offhand what your earnings were i 1953?

A Approximately $7,000.00.

Q $7,000.00.

A Yes.

Q Do you recall what they were in 1954?

A Approximately $8,000.00.

Q And what were they in 1955?

A $9,175.00.

Q So that for each of those last three years you have increased $1,000.00 over each year?

A That is true.

Q Have you ever been in the military service, Mr. May?

A I was in the Navy.

Q And what type training did you have in the Navy, if any?

A Well, I had regular boot camp, and then I served the rest of the time as a cook.

Q Have you had any other training or jobs outside of a sales type job?

A No, sir.

Q What about your education; how much education have you had?

A Well, I have had high school education, and attended the University of Tennessee on and off for about two years at night.

Q Did you ever get your degree?

A No.

Q And your last nine years have been with the Graybar Electric Company?

A That's right. (Tr. p. 2-6) • • •

Q Immediately after the collision, did you get out of your car?

A I tried to get out and I couldn't get out at first; my legs hurt, I thought they were broken or something. I tried with both hands to open the door and I just couldn't seem to move, and then, Mr. Pruett, which was the truck driver, ran over and asked me if I was hurt and I said I didn't know, and I was smelling gas and I tried to get out of the car.

Q Were you scared the car was going to burn up?

A Anytime you smell gasoline after a wreck, there is a possibility.

Q And did you finally get out of the car?

A I did.

Q Do you recall who helped you if anyone?

A Mr. Pruett kind of helped me out a little bit.

(Tr. p. 13) • • •

Q And then where did you go?

A I went in and called Mr. Menne at the Graybar Electric Company and called Wayne Berry and told him what happened, and told him to tell Menne to come and get me, that my car was wrecked.

Q Was your car driveable?

A No, it had to be pulled off with the wrecker.

Q Was the car damaged very much?

A The back end was almost up to the back seat.

Q How about the front end, was there any damage there?

A There was damage from the right center over towards the right hand side.

Q Now, the car was not driveable?

A No.

Q Did Mr. Menne come out there to see you and to pick you up?

A He did.

Q Were you having any pain at that time?

A My legs and my back were hurting.

Q Speak a little louder.

A My legs and my back were hurting.

Q Where did he carry you?

A He carried me back to the office. (Tr. p. 13-14) • • •

Q Now, after you got to the office, where did you go from there?

A To the emergency room at the Methodist Hospital. (Tr. p. 15) * * *

Q What did they do in the emergency room?

A Well, they examined me and took x-rays of my legs and my chest and looked at a knot I had on my head, and I waited around until the films were developed, and they said there was not any broken bones and he gave me some kind of pills to ease my pain and make me sleep that night.

Q Were you in much pain then?

A My back and legs were hurting, and my chest.

Q And where did you go from the Methodist hospital?

A Home.

Q When was the next time, Mr. May, that you saw a doctor?

A The next morning.

Q What was your physical condition the next morning?

A My back and my legs were hurting, and I couldn't straighten up.

Q You couldn't straighten up, you say?

A That's right. (Tr. p. 15) * * *

Q You state you never had to use a family doctor; what was your health prior to this collision?

A The best.

Q Had you ever had any trouble with your back of any kind?

A Not to my knowledge.

Q Had you ever had any trouble with your legs?

A Not to my knowledge.

Q Had you ever been in any automobile wrecks that hurt you?

A No.

Q The doctor that was mostly used was the doctor your wife went to?

A That's right, the doctor for the kids.

Q Had you ever lost much time from work because of any illness or sickness?

A No, sir.

Q You were in good health prior to this collision?

A That's right.

Q Now, were you an active person prior to this collision, in sports and other activities?

A I was.

Q Did you participate in any sports?

A Well, I played ball, such as basket ball, volley ball, soft ball, fishing and hunted quite a bit.

Q Did you work around the house at all?

A Oh, I worked in the garden and the yard.

Q Do you like to do that type of thing?

A I do.

Q Did you ever romp and play with the children?

A I used to, all the time.

Q You say you used to?

A Yes.

Q You don't anymore?

A It hurts.

Q Now, after you went to Dr. Mason, for a short period of time, did you go to another doctor?

A I went to Dr. Raskind.

Q Do you recall approximately when you went to see him?

A Well, approximately the latter part of August.

Q When you first went to see Dr. Raskind, did he make an examination?

A He did.

Q And what did he do, what treatment and what recommendations did he make?

A He recommended that I go in the hospital right then.

Q And did you go in the hospital at that time?

A Just as soon as he could get a room at the Saint Joseph's Hospital, I went in, which was one or two days later; I am not just exactly sure when it was.

Q Now, at the time you were examined by Dr. Raskind, how were you feeling?

A My back and legs were hurting, when I stooped over.

Q Were you able to work then?

A If you call that working, I did as much as I could around the house.

Q Did you try to work?

A I tried it.

Q Dr. Raskind put you in the hospital; what kind of treatment did you have in the hospital?

A They put me in traction.

Q Would you describe the traction that he put you in?

A Well, it is a round belt, something like a horse collar that they take and put around your waist, and it has two straps, one going down each side of your legs, and tied to a board; at the center of this board is a piece of rope going over a pulley with some weights hanging over the end of the bed to more or less stretch it.

Q You were in that traction during that hospital stay?

A I was.

Q. Now, during the time between the time the accident happened on July 13 and the time you were seeing Dr. Mason and going to Dr. Raskind, had you had constant pain during that time?

A I had.

Q That pain extended where?

A Down through my legs and up my back, and it seemed like it was all over.

Q What area of your back specifically did it pain you the most?

A Well, the lower part and the middle part, from here. (Indicating.)

Q You are indicating about the small of your back and the lower part of it?

A That's about it.

Q During that period of time, I believe you stated you began to bend over?

A That's right.

Q You mean bend over from the waist?

A No; I can't show you now because it hurts to bend over that way, but from the waist, forward like that.

Q Was your back stiff?

A Yes.

Q And I believe you are right now bent over from the waist?

A I imagine so.

Q Are you having any pain right now?

A Yes.

Q Whereabouts is the pain localized right now?

A In my leg and my back.

Q That is the same type pain you were having before?

A Yes.

Q Now, Mr. May, you came out of the hospital in August there after that first time; did you attempt to work at that time?

A I tried to.

Q How were you feeling?

A My legs and my back were still hurting.

Q And did you go back to see Dr. Raskind shortly thereafter?

A I did.

Q And what did he recommend at that time?

A That they run a myelogram.

Q Run a myelogram?

A Yes.

Q Do you know what a myelogram is?

A You bet you.

Q Would you explain to the jury in your terms exactly what it is to have a myelogram run on you?

A Well, it is a little hard to explain, if you have never had one, but what they do, they take a big needle and puncture your spine and let the fluid out of your spine and put some kind of dye or something in there so that they can make a picture of your back; and they put you on the table and turn you up on your head and turn you back up, and take pictures when they turn you up and down, like that.

Q All during that time, the needle is in your spine?

A All during that time, the needle is in your spine.

Q Is that a painful procedure?

A It sure is.

Q And how did you feel during the time it was being run?

A It hurt.

Q How about afterward?

A Well, afterwards you felt what they call a myelogram headache; I don't know how to describe it, unless any of you have had a sunstroke or something like that, how your head would pound, that is the same thing, only multiplied

quite a few times, the way your head will do when you have a myelogram headache.

Q Were you able to get any relief from that headache by the ordinary drugs?

A Well, you could get relief, but you could still feel it pounding.

Q And how long did that continue?

A For approximately twenty-four hours.

Q You say they stick this needle in your back; how large a needle is that?

A Oh, the needle I imagine is larger than a regular football needle that you blow up a football or basketball with.

Q And did you stay in the hospital after that myleogram for very long?

A I imagine about ten days after it; I don't remember exactly how long I did stay.

Q During the time you were in the hospital, did you have to take any drugs or anything for pain or rest?

A Shots, and some kind of pills.

Q You took shots and pills and these hypodermic needles?

A That's right.

Q And how did you feel during your stay in the hospital at that time?

A Well, you are in traction, and my back and legs were still hurting, plus the fact that I had the myelogram headache.

Q Now, at the end of that hospital stay, what did Dr. Raskind recommend to be done?

A An operation.

Q An operation on your back?

A That's right.

Q What was your first reaction to an operation?

A Well, I was scared of the operation and hesitant about it, and the other doctor, Dr. Mitchell, kind of mentioned a brace and thought maybe that might help some, and I told him I would rather try the brace instead of the operation at that time.

Q You were scared of it, so you wanted to try the brace first.

A That's right.

Q And did they prescribe a brace for you?

A They did.

Q Is this the brace that they prescribed?

A Yes, sir.

Q This has steel ribs in the back, I notice?

A Yes.

Q And on the side, too?

A Yes, sir.

Q Did you wear this brace after coming out of the hospital there in September?

A I wore it for approximately two months.

Q Now, what did the brace do if anything, to help you?

A Well, it held me up straight; they put you in traction to kind of straighten you out and relieve your muscles from drawing into a knot, and drawing you over, and after I got out of traction I put the brace on and I didn't bend over as much, but when I took the brace off, I was back where I started.

Q So that the brace would hold you straight up, but when you came out of it, you would go right back in the same position?

A That's right.

Q Was the brace comfortable or uncomfortable?

A It is very uncomfortable and very tight.

Q Were you having much pain during this period?

A My back and legs were still hurting all the time.

Q Now, you say you did wear it for a couple of months there; how did your condition grow during that time?

A It seemed to be getting worse.

Q And were you able to do your normal work at the office as a salesman?

A No, sir.

Q Could you get out and call on your customers as you usually did?

A I could call on a few, but I couldn't get around as much; I would get tired, about 2:00 o'clock or something like that; I just didn't have any pep any more.

Q During this period of time, were you able to pick up your children?

A No, sir.

Q Could you run and play with them as you did before?

A No.

Q Could you drive the car normally, as you did before?

A Not as well; I did drive the car.

Q Do you have a large catalog down there, as a salesman?

A I do.

Q Were you able to lift the catalog?

A No.

Q Did you from time to time carry cartons and things out to customers?

A I did.

Q Were you able to do that after this accident?

A No.

Q You went back to see Dr. Raskind?

A I did.

Q And how were you feeling when you went back to see him?

A The same way I felt when I went to see him the first time.

Q That is, you were feeling sore in the back and legs?

A That's right.

Q Were you bent over then?

A I was.

Q Very much?

A Well, as much as the brace would keep me from bending.

Q Now, when you went to see Dr. Raskind that time, what did he recommend for treatment?

A That I have the operation.

Q That is the same operation that you had been afraid of before?

A That's right. (Tr. p. 16-26)

Q You stated that you were scared of that operation?

A I was.

Q Had your condition got to the point where you were willing to go through the operation?

A It had.

Q Did you go to him for that purpose?

A When I went back to him, he said that was all there was left to do, that the race didn't do the job, and that was what needed to be done.

Q Now, when was that?

A That was about November 27, approximately.

Q Now, at that time could you raise your hands above your head and put them behind your head?

A I don't remember; I never did try it.

Q Could you lean over to pick up things, bend over and pick up things?

A I could if I bent my knees to do it.

Q Were you able at that time to stand up straight without the brace?

A I could; but it hurt.

Q Speak a little louder.

A I say I could, but it hurt.

Q Now, this was near the end of November, and the accident happened in July?

A That's right.

Q About four and one-half months?

A Right.

Q Had you had pain during all that period?

A I did.

Q Did you go into the hospital for this operation?

A I did.

Q When did you do so?

A November 28, I believe.

Q And was the opeartion performed?

A It was.

Q Do you recall the operation being performed, were you awake at any part of the time?

A Well, the spinal wore off during the operation and I woke up and told the doctor that it hurt and he pricked my legs with a needle to see if I could feel it, and he noticed me fliching and he asked the nurse to give me something.

Q That was during the time that he was operating on your back?

A That's right.

Q Was that accompanied by pain?

A Much pain.

Q And after you came out of there, how were you feeling after the operation in the hospital?

A Well, I was out—, you mean right after the operation itself?

Q Yes, sir, the next several days.

A Well, I was out the biggest part of the time; they had me out with a hypodermic.

Q And during the course of your stay in the hospital, did you have pain then?

A Quite a bit.

Q Whereabouts was that?

A I was out the biggest part of the time; it was mostly in my back.

Q So that you were having a lot of drugs and sedatives?

A That's right.

Q. You will have to speak a little louder.

A That's right.

Q Now, Mr. May, do you recall when you got out of the hospital the third time, after the operation?

A I think it was about December 12 or 13, somewhere along in there.

Q And when you got out of the hospital, where did you go?

A Home.

Q Were you able to go to work at that time?

A No.

Q Where did you stay when you were at home?

A In bed, on the couch.

Q Were you able to drive a car at that time?

A No, sir.

Q I believe you have already stated that your wife was expecting then?

A Yes, sir.

Q And when did you say the baby was born?

A The 20th of December.

Q You were not able to drive the car?

A No.

Q When did you go back to Graybar to work there?

A It was January 2nd; I went back for the first week in the mornings for a couple of hours, until about noon, and I went home; and the next week I started trying to work all day.

Q Now, during the period of time after the operation and before you went back to work, were you able to sleep all right?

A Not too much.

Q Did you have much pain there at home?

A I did.

Q After you went back to work, did you attempt to do the same work you had done before?

A I tried.

Q Did you try to call on the customers?

A Yes.

Q Did you try to do the normal activities that you had done before?

A I tried to do just like I always had done, but I couldn't get around to as many in a day's time as I used to.

Q You state then that you weren't able to do then what you had done before?

A That's right.

Q Were you able then and are you able now to pick up your child?

A No.

Q Are you able to lift your baby?

A I can, if I sit in the chair and Ann hands him to me.

Q I mean, can you reach over and pick the baby out of his crib?

A I can, but it hurts.

Q Where does it hurt?

A In my back.

Q Are you able to work in the yard now?

A No.

Q Are you able to drive for as long a period of time as you used to?

A No.

Q Have you tried some activities, any activities and found you were not able to do them, outside of the home; have you tried to go hunting or anything?

A No.

Q When did you go back to see Dr. Raskind?

A I believe it was January 9; I am not positive of the date.

Q How were you feeling then?

A Well, I was still—, my legs and my back were still hurting.

Q And were you bent over?

A Yes.

Q Well, what did Dr. Raskind recommend; what treatment did he give you?

A He didn't give me any treatment at that particular time; he said it would just take time for the operation o heal, and then they found out it hadn't done any good.

Q When was that?

A The first time was about January 9.

Q And you went back to see him in March, too?

A Yes, sir.

Q How were you feeling then, in March?

A My leg and my back was still hurting.

Q What did Dr. Raskind recommend doing at that time?

A He recommended I go back in the hospital and have some physiotherapy treatment.

Q Did you go back in the hospital then?

A I did.

Q And have you been receiving this physiotherapy?

A Twice a day.

Q Is the physiotherapy accompanied by any pain?

A It seems to me your muscles kind of relax or draw, I am not sure just exactly.

Q And you came from the hospital this morning, to come down here?

A That's right.

Q Were you also examined by another doctor on behalf of the defendant?

A I was.

Q Do you recall the name of that doctor?

A. Dr. Gotten.

Q That is Dr. Nicholas Gotten?

A That's right.

Q Did the defendants ask you to go there for that examination?

A They did.

Q And did you have any objection to doing that?

A As long as they didn't start any needle punching.

Q You did go for the examination, to see him?

A Yes, sir. (Tr. p. 26-33) • • •

Q Mr. May, in the course of your activities as a salesman prior to this collision, with the Graybar Electric Company, have you received any awards for your work?

A I have.

Q Now, speak up just a little louder.

A I have.

Q What type of awards have you received?

A Outstanding salesman of the year.

Q When was that?

A May.

Q 1955?

A Right.

Q Is your job a job that takes a lot of activity?

A It takes quite a bit.

Q Would you describe just the type of activity it takes to be a top salesman for Graybar Electric Company?

A Well, first of all you have got to call on your customers and be able to kind of go out in the field and follow the jobs and make a take-off and entertain your customers.

Q Had you done much work in the nights prior to this collision?

A Well, I used to do practically all of my work at night because I was in the process of trying to get orders, and I used to go home and prepare them, and take them off; and the contractors give you a set of plans and want the price on the job the next morning.

Q That is what you are talking about, when you say "make take-offs", taking off the plans?

A That's right.

Q Since that collision in July, 1955, have you been able to do the work that is necessary for that type of job?

A No.

Q Have you been able to take these plans home at night and make take-offs?

A No.

Testimony of Charlie E. May — Direct

Q Have you been able to make the continued customer contacts?

A Not as often as I should.

Q Have you been able to entertain any of these customers?

A No, sir; maybe take them to lunch or something like that.

Q Do you know, or have you tried to figure out approximately how much time you have lost from work?

A Approximately three and one-half months.

Q And in 1955, you had an income of $9,175.00; is that right?

A That's right.

Q During this period of time since July, have you tried to carry on your job as usual?

A I have.

Q Have you done everything that the doctors have told you to do?

A I have.

Q Have you undergone all of the treatment that they have recommended that you have?

A I have, and I am still doing it.

Q And you are still under Dr. Raskind's treatment?

A That's right.

Q When you leave here, you will be going back to the hospital, after this trial?

A That's right.

Q Mr. May, when did you go back into the hospital, Friday, I believe you said?

A Yes, sir.

Q That is this past Friday?

A The past Friday. (Tr. p. 33-36) • • •

Testimony of Charlie E. May — Direct

Q Mr. May, as we left for the luncheon recess, I believe I was talking to you about the limitation of function you have suffered as a result of this injury. I believe you stated that you weren't in a posiion now to be able to lift your children; is that correct.

A No, sir.

Q You are not able to lift your children?

A That's right.

Q And have you performed any of the functions in your home that you used to perform prior to the accident, such as working around the yard and in the house?

A Not working around, not even raking the yard or anything like that. (Tr. p. 37) * * *

Q Mr. May, you testified here that you had earned $9,175.00 during the year 1955; how long were you off from work in 1955;

A Approximately three months.

Q Now, those earnings of $9,175.00 that you received, to what part of the year 1955 would they be attributed?

A To the first half of it.

Q How are you paid?

A I have got a draw, and then I have got commission; my commission is based on my sales and my sales made up the biggest part of the $9,175.00; that was on orders that I received during the first part of the year, and shipped along during the year.

Q From July 13, 1955 through the end of the year, were you able to produce the same amount of business, or do the same amount of work you had done previously?

A Definitely not.

Q Since January, 1956, the first part of January, have

you been able to produce the same amount of business that you had normally done prior to this collision?

A No, sir.

Q Mr. May, you have been in the hospital three different times not including the present time, is that correct?

A Three different times.

Q And during part of that period of time, have you stayed at home?

A Part of it.

Q Are you able to sleep well at night?

A Not too well; I have to put a mattress on the bed, and in between the mattress you have got boards, and sometimes it feels better to get on the floor than on the mattress or the bed.

Q During this period of time, have you been taking aspirins?

A It doesn't do any good; I have taken them.

Q Has the doctor prescribed, and have you taken sedatives?

A I have taken capsules that he prescribed.

Q Now, Mr. May, you have testified that you have a limitation of activities; that limitation stems from what part of your body?

A From my legs and my back.

Q How has that limitation affected your working as a salesman for Graybar, or attempting to work for them?

A Well, the fact that I can't carry my large catalog around, or various samples and things like that, and go and get some things in a hurry for a contractor and take it back to him to the job, and various things like that, where it involves lifting something. (Tr. p. 38-40) • • •

Q Are you having much pain right now?

A Yes, sir, my back and legs are hurting.

Q Mr. May, have you received any doctor bills or hospital bills for this present hospitalization?

A No, and I am still in the hospital; I am just out for a leave of absence for Court.

Q You are just out for these couple of days during the trial?

A No, sir, I have got to go back in the hospital this evening.

Q You have got to go back in there tonight?

A That's right.

MR. MACK: I believe that is all. (Tr. p. 42)

• • • • •

CROSS-EXAMINATION

BY MR. FLOYD:

Q Now, Mr. May, as I understand it you are not working on a salary basis?

A It is a form of salary, it is a draw; in other words, it is more or less—, it is a draw on the fact that if you make it it is a draw, and if you make more than you draw, then you don't go in the red; but if you don't make your draw, you go in the red.

Q In other words, you get a commission on your sales and that is what your draw is, a charge against your commission?

A That's right; in other words, you have so much money off of your sales, and then your salary each month, the draw is drawn from that, and what is left, that is your commission and you get it the next period when it is issued.

Q When they settle up with you, the first of the year?

A The first of April of next year.

Q Did I understand that you haven't had a settlement for the year 1955 yet?

A That's right.

Q But you know how much it was, or how much it will be?

A Yes, sir.

Q And that is after taxes are deducted, $8,349.50; is that the information you supplied Mr. Mack?

A Well, I couldn't tell you those figures offhand, after taxes are deducted.

Q Well, this figure you testified to now is $9,175.00; that is gross before taxes?

A Yes, sir; that is what shows on my W-2 form.

Q Well, don't you think this is approximately correct after taxes, $8,349.50?

A Yes, sir, that should be something like that.

Q And in the year 1954, after taxes, was $7,792.00?

A That is going back too far, just offhand.

Q What about 1953, $6,600.00 after taxes?

A I don't remember; that is going back a little bit too far.

Q Well, it has been increasing for those three years?

A Yes, sir.

Q Do you think this $8,349.50 is approximately correct after taxes?

A Yes, sir.

Q That takes a big chunk out of it?

A That takes a big chunk, yes, sir.

Q Now, you have certain customers assigned to you by the company?

A Yes, sir.

Q You can't work the field just anywhere you find anybody in Memphis to sell to, to go ahead and sell it?

A No, sir.

Q Now, of course it is your duty in your business to call on the customers and get orders out of them for merchandise, because that is what you get your commission on?

A That's right.

Q When they assign those customers to you and a customer wants to make a purchase, and you don't happen to be handy, would the customer call the order in, and you get a commission on that, do you not?

A That is only the small stuff, like lock nuts and rolls of bushings, or stuff like that, that they would normally buy.

Q Between the time you call on them, if they call in an order like that, you get their regular commission?

A Yes, sir.

Q Although you didn't actually go and solicit it and write that order up?

A That's right. (Tr. p. 50-52) * * *

REDIRECT EXAMINATION

BY MR. MACK:

Q Mr. May, has the Graybar Electric Company put another man into your territory now?

A Have they put another man in there?

Q Yes, sir, in addition?

A They have taken some of my customers and they put out a new salesman.

Q Now, this figure you gave of $9,175.00, that is income that you received, isn't it?

A Yes, sir, for the year 1955. (Tr. p. 56) * * *

DIRECT EXAMINATION
BY MR. MACK:

Q You are Doctor Robert Raskind?

A That is correct.

Q You are a licensed and practicing physician in the State of Tennessee?

A That is correct.

Q You specialize in neurosurgery?

A Yes. (Item 11 p. 2) * * *

Q Doctor, did you have occasion to examine and treat a patient by the name of Charlie E. May?

A Yes, I saw him on August 10, 1955. He gave a history of having been in an automobile accident on July 13, 1955, at which time he was struck from the rear and was thrown forward. He developed low back pain without sciatica. He had a 40% to 50% overall restriction of the range of motion of the lumbar spine. Naffziger and Lasegue signs were negative. There was no motor weakness or sensory loss made out.

I saw the films made at the Methodist Hospital when Doctor Mason saw him. They showed no evidence of trauma, that is, of recent trauma. It was my opinion at that time he had a low back strain and because of the persistent pain I recommended hospitalization and a more intensive type of conservative treatment. He was admitted to the hospital August 12th, at which time he was given physiotherapy, traction and other therapeutic adjunets.

Additional x-rays were made at the St. Joseph Hospital, and they showed he had definite loss of lumbar lordosis, which was not quite so apparent on the first films.

At the conclusion of this conservative treatment he was somewhat improved, but upon becoming ambulatory, he developed sciatica for the first time.

Q Doctor, when did you next see this patient?

A I next saw him on August 31, 1955, with acute back pain, the sciatica was worse, and he had a positive Lasegue sign. He experienced pain on walking and because of these findings I sent him back to the hospital for a myelogram.

On September 1, 1955, he entered the hospital and the next day myelography was carried out. No defect was noted and he was again put on conservative treatment and improved to some extent.

Q When did you next see Mr. May, doctor?

A I next saw this patient on October 14, 1955.

MR. FLOYD: What was that date, doctor?

A October 14, 1955. At this time he had a very irritable back, with a positive Lasegue sign, which, at this time, was more positive than on August 31. It was two plus, compared to one plus. In spite of the negative myelogram, I was of the opinion he had a disc herniation, and that there should be an exploration.

Mr. May was again admitted to the St. Joseph Hospital, and by the way, this was the third time, on November 29th, and on the following day, the disc exploration was carried out, which revealed a central protrusion of the disc at the L-4 interspace and also a protrusion of the disc at the L-5 interspace, with a compression of S-1 nerve root on the left. Both of these discs were removed and after the usual post-operative course, he was dismissed from the hospital.

Q Doctor, what was the date he was dismissed from the hospital?

A December 10, 1955.

Q When did you next see Mr. May, if you saw him again?

A I saw him on January 6, 1956, in the office, at which time he was still having a good bit of irratibility in his back and he was still overweight. He weighed 161 pounds and was having more back irritability than when I saw him before. He was having considerably more back irritability than I thought he should have and I put him back in the hospital for more physio-therapy.

Q Now, doctor, going back over some of these matters which you have gone into, I believe on your initial examination in August, you noted a flattening of the lumbar curve?

A That is correct.

Q That is a flattening that is against the normal curve you would expect to find?

A Yes, a deviation from the normal, definitely.

Q Doctor, on that occasion did you find Mr. May was suffering with pain in his back?

A Yes, that was his complaint at that time, complaint of low back pain, with the sciatica, which, incidentally, is not unusual because frequently the back pain, the sciatica comes on from one to five months after injury. It is frequently that long before there is an impinging on the nerve root.

Q Doctor, you mentioned some x-rays were taken immediately after the accident and you examined those?

A Yes.

Q You found no indication of disc herniation?

A I cannot say that, but there was no evidence of recent trauma. You cannot demonstrate a disc herniation on a plain x-ray, and that is the reason for the myelogram. A

disc herniation doesn't show on a routine x-ray of the lumbar spine.

Q Doctor, during the time Mr. May was in the hospital in August, was he having pain, was he having pain while he was in traction?

A No, he was responding pretty well to traction. From August 12th to August 23rd, I thought he was responding quite well, but he began having pain when he got up.

Q The pain was evident then again when he got on his feet?

A Yes, when the traction was discontinued there was a recurrence of the symptoms.

Q During the time he was in the hospital, was he under sedation?

A He received some codeine, but we don't give the patients with these discs anything stronger than coedine because if they require any sedation stronger than that, they are bad enough to have the disc removed immediately.

Q Doctor, I believe you stated in one of your reports that after Mr. May came out of traction, there was a return of the irritability in his back with sciatica?

A Yes, after the first episode of traction, that is the first time he had sciatica.

Q Doctor, in general terminology, what is sciatica?

A It is pain down across the sciatic nerve from the buttocks to the ankle.

Q The pain radiates round the back and into the leg?

A Yes, that is very characteristic disc pain.

Q I believe you mentioned he had a positive Lasegue sign?

A Yes, bilaterally.

Q Doctor, what is the Lasegue sign?

A That is where you put a stretch on the sciatic nerve and when there is pain, the sign is positive as referred to the low back, usually on the same side as the disc.

Q Is that an objective or a subjective symptom?

A It is objective.

Q You stated he was admitted to the hospital the first of September for a myelogram?

A That is correct.

Q Will you state why the myelogram was indicated, doctor?

A He had low back pain with sciatica without localization as to the level.

Q What is the purpose of a myelogram?

A It is pre-operative and is to localize the point of herniation.

Q What was your impression at that time as to his injuries?

A He had a disc herniation, in my opinion, even though we failed to demonstrate it on the myleogram, which is not an unusual situation because in the lumbar area from 10% to 15% and some authors give a higher percentage, even 25%, and in my opinion, 10% to 15% do not show on a myelogram because of certain technical reasons.

Q Doctor, will you explain to the Court and jury the procedure in giving a myelogram?

A It is done by inserting a needle in the low back, inserting or rather, injecting a substance which shows up on x-rays. After the myleogram is completed the substance is removed. While the fluid is in the spinal canal fluoroscopically and radiographically it is examined.

Q Is that comfortable or uncomfortable?

A Sticking a needle in anybody's back is not comfortable, does not feel good.

Q Doctor, is that accompanied by headaches and other signs and symptoms?

A About half of these patients develop headaches within the first twenty-four hours. That depends to some extent on how they behave after the procedure.

Q What type of fluid is introduced into the spinal canal?

A The substance is called pantopaque, but I don't believe we need to go into the composition of it. It is an inert substance which shows on x-ray and is easily removed.

Q Doctor, is that substance irritating?

A To a very small degree.

Q Doctor, then as I understand it, the myleogram is not such more for diagnosis, but localization?

A That is correct.

Q It is a pre-operative procedure?

A Yes, and in my hands, I would say roughly 75% are pre-operative for localization.

Q You say Mr. May was released from the hospital on September 10th?

A That is correct.

Q Doctor, at that time did you prescribe the use of any brace of any kind?

A Yes, he was fitted with a back support and I had him on a reduction diet. He seemed to be responding fairly well to the conservative treatment, but he had a recurrence of the low back pain with sciatica. He was re-admitted to the hospital on November 29th and operated upon the following day.

Q Did you know anything about his activities during that time, whether they were restricted or not?

A Do I know what he was doing during that time?

Q Yes?

A He should have been restricting his activities, but I cannot say he was or was not, because I did not have that close contact with him.

Q When he came back on November 25th, you stated he was having low back pain with irritability?

A Yes.

Q What do you mean by irritability in the low back?

A It is the type irritability that causes muscle spasm, the response of back muscles to injury or disease.

Q Doctor, the situation in this case, as proven at surgery, was two herniated lumbar discs?

A That is correct.

Q You recommended a laminectomy?

A Yes.

Q Doctor, will you describe for the Court and jury in general terms the function of the spine in the body?

A It is a bony structure, it supports the structure of the back, holds a person erect. The larger blood vessels are supported by it and it protects the spinal cord from injury.

Q Will you tell us, doctor, what the spine is made of?

A It is made up of segments, alternating bone and cartilage, five vertebræ in the low back, twelve dorsal, and seven in the neck.

Q Doctor, there is one disc between each pair of bony vertebræ?

A Yes.

Q What is the function of a disc?

A It provides a cushion between the vertebræ.

Q Does it have anything to do with the motion of the spine?

A To some degree, the discs are involved in the motion of the spine. The motion is primarily mediated at the articular facets.

Q If the discs were all removed and the vertebræ were fused, would you not get more shock to the brain along the spine?

A Do you mean if the entire spine was fused?

Q Yes, or partly fused?

A Fusion of the spine is well recognized in medicine and I don't know of anyone getting any shock to the brain from a fusion.

Q Doctor, will you explain what happens when a disc herniates or ruptures?

A In this instance we are dealing with a posterior herniation and the restraining wall tears, tears on the back side of the vertebræ, and when this takes place, some of the more flexible material pushes its way out through the tear and in a posterior herniation one develops back pain and when the herniation gets to the point where it presses on the nerve roots, the patient has sciatica which this man has.

Q That is in a central protrusion of the disc?

A Yes, posterior, this is one of posterior disc herniation.

Q Doctor, during the course of time when this man first came to you in August, you say you treated him conservatively?

A Yes, he was treated conservatively until November, when surgery was carried out.

Q State whether or not during that time he had gotten progressively worse?

A There was a temporary response to traction, but when it was discontinued, the symptoms recurred.

Q Doctor, did the pain he had continue during this period of time?

A Yes, when he was out of traction, he had a flare-up of the pain.

Q You say you did do a laminectomy on this patient?

A Yes.

Q Doctor, will you describe to us what a laminectomy consists of?

A We would be here all day if I did that, and I don't think it would be helpful.

Q Will you just tell us briefly in general terms what a laminectomy is?

A We make an incision in the low back and separate the muscle from the bone, remove a small part of the lamina, a small section of the vertebræ and remove the disc according to well established technique used by all neurosurgeons in this country.

Q Doctor, you did remove two discs, did you not?

A Yes, he had a very definite central protrusion of the disc at the L-4 interspace and L-5 interspace.

Q During the course, after the operation, was this accompanied by pain?

A Yes, any operation is accompanied by a certain amount of pain.

Q Did you have to put Mr. May back in traction after surgery?

A No, not since surgery, but the 9th of this month he was put back in the hospital for some further physio-therapy. He had too much post-operative back irritability and I was trying to reduce that.

Q Since the operation, have you seen Mr. May?

A Yes, I saw him on January 6th and again on March 6th.

Q Doctor, state whether or not he has received the relief you had expected he would?

A No, he has not received the relief I expected; he has more back irritability than he should have following disc removal.

Q You are treating him now?

A Yes.

Q Where?

A At the St. Joseph Hospital.

Q What treatment have you prescribed for him?

A The current treatment is that of sedatives, muscle relaxation, and physio-therapy, which is much like the physio-therapy given polio patients. He is put in a tank of water and heat is applied to limber up the muscles which have been out of play because of a long period of disuse. I am also trying to get his weight down to a more sensible level.

Q Doctor, how long do you expect this physio-therapy will be necessary?

A Usually ten days to fourteen days in the hospital and as an out-patient four trips a week for four to six weeks usually does the job.

Q Can you give us an estimate of the disability which Mr.: May has sustained as a result of this injury?

A I would say currently on the basis of restricted motion of the lumbar spine and pain on certain activities, his disability is 25% of the body as a whole, and if the physio-therapy is a success, his degree of disability should be less at the conclusion of the physio-therapy.

Q Doctor, what criterion do you use to measure this percentage of disability?

A The low back has a range of 90 degrees flexion, 15 to 20 to 25 degrees lateral and currently his restriction is approximately 50%. I also took into consideration the muscle spasm and segmentation. He has no leg signs at the present time and his disability is based on the malfunction of the back which in my opinion, currently is 25% of the body as a whole.

Q In considering this percentage of disability which you say is based on the malfunction of the back, did you consider the type of work Mr. May is engaged in, that of an outside salesman.

A No, at this time it is on an anatomical basis. So far as considering the type work he does, he has not come along far enough to consider that yet. His work status was not taken into consideration.

Q After the removal of these two discs, and his present condition as you see it, could Mr. May stand on his feet for extended periods of time?

A It is much too soon to say about that aspect of the case It has only been three and a half months and is too soon to tell.

Q Doctor, in the future, after a disc operation, what are some of the limiting factors a person has with regard to lifting, extended driving, and things of that kind?

A Some people have difficulty lifting, some do and some don't. It is hard to say who will and who won't. Three and a half months is too soon after disc surgery to tell about that. I have seen many of these patients who failed to reach maximum improvement before 12 to 18 months following surgery.

Q I believe you stated that at the present time he is having considerable pain and back irritability?

A Yes, he has had much more than I expected and that is the reason I have had him hospitalized for further physiotherapy.

MR. MACK: You may cross-examine, Mr. Floyd.

• • • • •

CROSS-EXAMINATOIN
BY MR. FLOYD:

Q Doctor, did you see Doctor Mason's x-rays?

A They weren't Doctor Mason's x-rays. They were x-rays made at the Methodist Hospital.

Q You saw those x-rays?

A Yes.

Q There was no evidence of fracture?

A No

Q They showed no evidence of dislocation?

A No.

Q Strangely enough, Mr. May has not had any complaint of a whiplash injury to his neck?

A No, his complaints have been with relation to the low back and incidentally, for the purpose of comparison, we sometimes have two sets of x-rays made because two are better than one and they were repeated on the 15th day of August and there again, except for the fact the curve was gone, between those two examinations there was no evidence of fracture or dislocation or bony injury.

Q Was there any loss of lordosis on the first film?

A Some, but not as much as on the second. That is pretty consistent with an injury of this type.

Q Doctor, in regard to this particular area, that is, in the fourth and fifth interspaces—(interrupted).

A Fourth and fifth lumbar interspaces.

Q In the lower part of the back—(interrupted).

A Yes, the low back.

Q The fifth interspace is between the last lumbar vertebræ and the first sacral?

A It is between the last lumbar vertebræ and the sacrum, you might say. It is sometimes referred to as segments, but it is really only one.

Q It is known as the tail bone?

A No, the coccyx.

Q The spinal cord doesn't extend that far, does it?

A No, down to the D-12-1 interspace.

Q That is the twelfth dorsal?

A Yes.

Q That is the one the ribs come out of?

A Yes.

Q That is known as the thoracic?

A Yes.

Q Doctor, when you do a myelogram, you inject the substance below the end of the spinal cord so there won't be any damage to the spinal cord itself?

A The reason you inject it as low as you do is because it is the easiest place to insert the needle and pool the fluid. It is pooled by gravity. You can do it with a puncture of the spinal cord.

Q You do hundreds of those every year?

A Myelograms?

Q Yes?

A I did 188 last year.

Q Then, it is a common procedure for a neurosurgeon?

A Yes, that is at least one every other day.

Q Doctor, these discs can herniate either posteriorly or anteriorly, to the front or back?

A Yes, but they give a different clinical picture. I didn't go into the findings anteriorly because I did not think it pertinent, but by means of additional explanation, the vertebræ, that is, the vertebral bodies, that is where the discs are.

Q That is the very front part of the backbone structure?

A Yes.

Q The spinal cord and the nerve roots lie just to the back of that in a rounded area?

A Yes, it is called the neuro canal.

Q There is also some more bone back of that?

A Yes, the laminæ and the spinal processes.

Q You say you cut out a small piece of the lamina?

A Yes.

Q That is the way you get the hemilaminectomy?

A Yes, you take one-half to one-third and that gives exposure sufficient to let the disc out.

Q Does that small piece of bone weaken the back in any way

A No, it has nothing to do with the supporting column. No weight is put upon the lamina.

Q The lasegue sign, is that the same as a straight leg raising test?

A Yes.

Q Doctor, do I understand that originally when you first saw Mr. May he had no Lasegue sign?

A That is correct; the first time he had an apparent Lasegue sign was after he got up out of traction.

Q Does that mean he had no leg pain?

A He had no sciatica or positive Lasegue sign until after he got up in August from hospitalization.

Q Sciatica would be pain in the leg?

A Yes, he didn't have any leg pain or Lasegue sign until he got up, got out of traction.

Q He did not complain to you about any leg pain?

A No.

Q Your examination did not reveal any

A No.

Q Doctor, is that compatible with the course of these things?

A Yes, they have back pain anywhere from one to six months before they begin to develop the sciatica. When the disc comes out far enough to impinge the nerve roots, the sciatica is present. Some patients have longer nerve roots.

Q Doctor, is this the usual way a herniated disc occurs, the history Mr. May gave you in this case?

A It is not the most common, but one of several ways a herniated disc occurs.

Q Ordinarily, they occur in industrial work among laborers who do heavy lifting?

A Yes, that is one of the common ways, but certainly this type of accident does produce a lumbar disc herniation.

Q Doctor, you also do a large number of these disc operations each year?

A Yes.

Q Do you have a figure available on that?

A I did 145 lumbar discs last year, and 13 cervical discs.

Q That is one hundred fifty-eight disc operations last year?

A Yes.

Q Was that about a normal year?

A It is about an average year.

Q Now, doctor, as I understand it, in this case, and correct me if I am wrong, Mr. May's present symptoms are due to weakness of the back muscles, inactivity, stiffening of the muscles from inactivity?

A Yes, and he is overweight and overweight individuals have more trouble post-operatively from surgery of this type than individuals of normal weight. After the removal of a disc a scar is formed there, but it is not as good as the material that was originally there and the secondary repair is of such a nature a person cannot bear the weight he could before and people who are overweight have a slower healing than a person of normal weight.

Q Have you cautioned Mr. May all along about getting his weight down?

A Yes.

Q Has he done that?

A He didn't do bad. I got him down from 188 pounds to 161 pounds and then down to 156 pounds, but that still wasn't enough. That is a good start, but he needs to take off another 16 pounds anyway, before he will have a good back.

Q What should he weigh?

A About 140 pounds.

Q He still weighs too much?

A Yes, and he is shorter than I am.

Q Doctor, I think I have one further question; does the prolonged wearing of the back brace tend to weaken back muscles?

A Yes, to some degree, but in warm weather a back brace is so uncomfortable, a patient usually takes them off

before we instruct them to. If he has pain, he will not move the muscles and we have to resort to the brace.

Q Now, one further question; about the myelogram, the substance you inject in the back or in the canal is to look at it under a fluoroscope and take x-rays?

A Yes.

Q Then that substance is withdrawn when the procedure is completed?

A Yes.

Q Now, in the myelogram, you could not localize the area of herniation?

A That is correct. In lumbar myelography the average figure is 10% to 15% of the disc herniation that is not demonstrated, and some authors put it as high as 25%. In my experience, it has been 10% to 15%. In a fellow with this much weight, with a wide spinal canal, the indentation is so small you cannot see it as well. That is pretty consistent with most of the literature, and it has been my experience that between 10% and 15% of these disc herniations do not show on the myelogram.

Q So, you actually did an exploration?

A Yes, and found two protruded discs.

Q Doctor, what was the reason for going into the site of the fourth lumbar?

A Unless you have a good localization by myelogram, one looks at two interspaces. If you have a good localization, you don't look at both of them. With good localization, you have a shorter operative period. However, if you cannot demonstrate it with myelography, your only alternative is to look at the two spaces and in this case, we could not get a good myelographic localization and we looked at two spaces.

Q You were an hour and 21 minutes performing the operation, doctor?

A Yes.

Q Is that about the average time?

A That is a little longer because he is quite obese. It takes a little longer to go through all that fat.

Q The average disc operation is about an hour?

A Yes.

Q As I understand it, you are not at this time attempting to give any estimate as to Mr. May's permanent disability because sufficient time has not elapsed?

A There is no way to rate him so far as permanent partial disability goes, because there has not been sufficient time post-operatively. It is a good conservative estimate in a general way and only in a general way, but as a general rule, we have to wait at least as long post-operatively as the patient had the lesion pre-operatively. That is a minimum period before we feel we can accurately state what his permanent partial disability will be, and in some individuals, it is longer than that. He had his disc from July to November or the first of December and it would be at least five months following surgery before any accurate estimate of his permanent partial disability could be made.

Q Doctor, is it true you expect some improvement as time goes by?

A We will put it this way, I am not happy with a 25% permanent partial disability. I usually do better than that, usually it is 10% to 15% and sometimes even better than that, and tha is the reason I have him in the hospital and am still working with him.

Q You do have some cases where there is no permanent partial disability?

A We have some with no residual.

MR. FLOYD: That is all.

* * * * *

RE-DIRECT EXAMINATION
BY MR. MACK:

Q Doctor, in this particular case, do you expect Mr. May to have some eventual permanent partial residual disability?

A Yes; I would say being overweight to start with and having the difficulty he has already had, I do not expect him to make a complete recovery. As I told him the other day, his recovery will depend a great deal on how successful he is getting his weight down and keeping on the exercises.

Q You have gotten him down 32 pounds?

A Yes, and that is a pretty good start, but we ought to get about 16 more pounds off of him.

Q So you have made a pretty good start so far?

A Yes.

Q Doctor, when you cut out these discs, do you fuse the vertebræ together?

A We sometimes do, yes.

Q You didn't in this case?

A No.

Q Doctor, do the vertebræ themselves rest on each other when the discs are removed?

A No, it is filled in with fibrous tissue, a dense scar like an abdominal scar, except it is harder and more firm and not as springy as the disc is originally.

Testimony of John Flagg — Direct

Q You removed the normal cushions which are put there by Nature?

A Yes, but as I said, it is filled with a fibrous tissue and there is a decrease in the degree of mobility. There is some "give" to the scar Nature puts in there.

MR. MACK: That is all. (Item 11 p.4-29) * * *

DIRECT EXAMINATION
BY MR. MACK:

Q You are Mr. John Flagg?

A Yes.

Q And by whom are you employed, Mr. Flagg?

A The Graybar Electric Company.

Q And what is your position with the Graybar Electric Company?

A I am the financial manager.

Q How long have you been with Graybar?

A Approximately eight years.

Q Do you work out of the same office that Mr. Charlie E. May, the plaintiff in this lawsuit, works out of?

A Yes.

Q And where is that located?

A 1474 Lamar.

Q How long have you been in Memphis?

A Over three and one half years.

Q Mr. Flagg, how long have you known Mr. Charlie E. May?

A Over three and one half years.

Q Ever since you have been down here?

A Yes, sir.

Q And what is his position with Graybar?

A He is a salesman, calling on city accounts.

Q Are you familiar with his activities as a salesman calling on city accounts?

A Yes, sir.

Q Would you describe to the jury in your own words, Mr. May's ability as a city salesman prior to this accident?

A Well, Charlie May has been our top salesman, both in the city and in the territory, both in our supply lines and in our appliance lines; he is a very aggressive salesman with a lot of follow-through, and in all respects a top salesman.

Q Has he ever been nominated by the Graybar Electric Company for any awards in that position?

A Yes, we work out of St. Louis which is our district house, and the district house was asked to nominate an outstanding salesman for the district, which would include Little Rock, the Memphis office and the Springfield office and our St. Louis office; and last year Charlie May was nominated for that award and he went to St. Louis; that was approximately in June or early July.

Q Just shortly prior to this accident?

A Yes, just shortly prior to this accident.

Q Now, Mr. Flagg, do you work with or did you work with Mr. May down there in his work at Graybar?

A Yes, very closely with him.

Q What would be the contact you would have with him?

A Well, in my responsibility of supervision of all credits and collections and any other matters, that would come through my department, and Charlie in handling large contractors, that does involve credit problems and it is practically a day by day matter of working with the salesmen calling on that type of account.

Testimony of John Flagg — Direct

Q Now, Mr. May, as a city salesman, what are his activities in making sales for the company?

A Well, first and foremost is the actual customer contact, meaning calling on the trade; beyond that, he backs them up, giving them price information and technical information.

Q Does that require any additional work outside of the normal working day at the office?

A Yes, we say to our salesmen that their job is a 24-hour a day job; to be a successful salesman with our company, you can't start at 8:00 o'clock and end at 5:00 o'clock, and especially if you are calling on a contractor, you are expected to take blue prints and the drawings home and do technical take-offs for them; and I would say that Charlie May put in at least ten hours a day each day.

Q Was that reflected in his earnings from the company?

A Very definitely.

Q And what about his production?

A Well, as I said, he is our top salesman; he was our top producer, not only in business, but in gross profits.

Q And he was injured in an accident on July 13, 1955; do you recall the accident that day?

A Well, of course I was not a witness to the accident; I saw him in our office shortly afterward.

Q Would you describe his appearance when you first saw him there in your office?

A Well, it is hard to describe his exact appearance, except to say that he was visibly shocked; he was in pain, he had no idea what was wrong with him; he was an extremley worried man.

Q Did he at that time or a little later go to a hospital?

A Yes; as a matter of fact, I and the warehouse foreman took him over to the Methodist Hospital.

Q Now, Mr. Flagg, since July 13, the date of this accident and up to the present time, have you had an opportunity to observe him at the times he has been in the office?

A Yes, sir, I have; I have seen Charlie May every day that he has been to work since the accident.

Q And would you describe to the jury his general appearance over that period of time, and from time to time?

A Well, Charlie was in the hospital three separate times during July and August, and then again in December; each time that Charlie came back from the hospital, he seemed to be all right, especially his carriage was good, but in a week or ten days or two weeks' time, it seemed that this gradual bending over took place until he was actually walking with a very pronounced stoop; that happened after each stay in the hospital.

Q Now, at the times you had seen him, did he appear to be in pain?

A There were times when I felt that he was in pain, and he stooped over, and also by facial expressions, just in my talking with him when he would come into by office and sit down and we would talk strictly business, he would look to me by his facial expression that he was in pain.

Q Did you notice any change in Mr. May's personality or disposition over this period of time?

A I noticed quite a change in Charlie May's personality; I will speak of his sales personality. Charlie being our top salesman, he had to be an aggressive salesman; since the accident, I could not call him an aggressive salesman.

Q Has that been reflected in his production there at the company?

A Yes, sir, to some extent it has.

Q Now, the territory that he has covered in the past has normally been the territory in the city, I believe you stated?

A Yes, sir, exactly; he handles city accounts and he is assigned a certain number of those accounts in the city.

Q Since the time of this accident in July, has anything happened to any of those accounts?

A Well, we had three salesmen out in the city selling electrical supplies; I think it was February 15, we put the fourth salesman in the city.

Q Now, your purpose in putting out that fourth salesmen was for what?

A Well, it was for a number of reasons; we felt that we were losing some volume in the city and we did want additional sales coverage.

Q Have you noticed a loss of production on the part of Mr. May over this period of time?

A Well, the only figures that I have looked at, which I feel would be a good indication of sales volume figures were for the first two months of this year, as compared to the first two months of last year.

Q Do you have any particular reason for picking those months?

A Well, in our business if a salesman writes a large order, usually it is for a contract; many times the material is not going to be delivered the same day, or in three weeks; it might be a period of three or four or five months that we complete the shipment of the order. The accident was, I think, on July 13; of course a good amount of business that was credited to Charlie May from the time of the accident until the end of the year covered business that he had written prior to the accident. I felt that as of the beginning of

the year, just about all of the orders written prior to the accident had been completed, plus the fact that Charlie came back from the accident right after—; excuse me, he came back from the operation and his recuperation period right after the first of the year.

Q Those were the first two full months that he had worked?

A I think those were the first two consecutive months that he had worked since the accident.

Q Do you have any figures on the production that he had in January and February, 1955?

A I have brought those figures.

Q I notice you are refreshing your recollection from some memoranda you have there?

A Yes, sir.

Q Did you make that?

A Yes.

Q Now, would you state to the jury what production Charlie May had in January and February, 1955?

A The total was $69,875.00.

Q Now, do you have a production figure for January and February, 1956?

A That figure is $62,767.00.

Q There is a decrease in his production of what, about $7,000.00, a little more than $7,000.00?

A Yes, sir.

Q Have you obtained the earnings that Mr. May has had over the past three years at my request?

A Yes, I have them here.

Q Would you state to the jury what his earnings were in 1953?

A In 1953, Charlie May earned $6,629.58.

Q In 1954?

A In 1954, Charlie May earned $7,792.00.

Q In 1955?

A In 1955, Charlie May earned $9,115.00.

Q Now, Mr. Flagg, with reference to your figures on that production for January and February, 1955 as against January and February, 1956, had the general business conditions of these two months in 1956 been as good as those in 1955?

A Well, our records show that the first two months in 1956 have been better from the volume standpoint than the first two months in 1955.

Q And I believe you state that Mr. May's production has gone down some $7,000.00 in those two months?

A Approximately $7,100.00.

Q During the course of this time, Mr. Flagg, after these hospitalizations and coming back to work, in your observation of Mr. May, have you noticed any difference in his handling of his work there?

A Yes, he has handled his work differently in that he has spent a great deal more time at the office. Like I said before, a successful salesman has got to have customer contact, he has to be out seeing his customers; Charlie has spent a great deal more time in the office phoning his customers.

Q I believe you have already stated that you have noted a decrease in his personality, his sales personality?

A Well, it comes fairly close to an apathy; he just has lost a terrific interest and drive and aggressiveness that he had in his work before.

Q How about his relationship with the other salesmen?

A I can't comment upon that.

Testimony of John Flagg — Direct

Q In the course of his job as a city salesman, would he have any opportunity or would you have any occasion to know of opportunities when he would work with his customers, such as getting items for them and things of that kind?

A Yes; at times our salesmen have to be errand boys and they have got to pick up wire or parts at our counter and bring them out to the customer; if the customer needs something at the job fast, we have to get it to him right away; of course, our salesmen have to do that.

Q Has he been able to do that to the same extent that he did?

A No, he has not.

Q I believe you stated he is spending more time in the office when he is down there?

A Yes.

Q Mr. Flagg, in your position with the company, you are familiar with the opportunities available for advancement in that company?

A Yes.

Q I believe you are an employee also?

A Yes, sir.

Q Were there opportunities there for advancement of Mr. May?

A I would say very definitely on the strength of his outstanding sales performance.

Q And has his sales performance been diminished now?

A According to the figures I read, it seems for the first two months of this year they have decreased.

(Tr. p. 59-68) • • •

Q Did you have an opportunity to observe Mr. May in

the latter part of February and the first part of March of this year?

A Yes.

Q What was his condition at that time?

A Well, Charlie seemed to have improved after coming back from the operation and recuperation period; as I remember, it was late in February and early in March that the pronounced stoop appeared again, and he was walking bent over.

Q That is when he went back to the hospital?

A Just this past time?

Q Yes.

A Yes.

MR. MACK: I believe that is all.

* * * * *

CROSS-EXAMINATION
BY MR. FLOYD:

Q Mr. Flagg, do you have the figures on his sales for 1954 for the same period, January and February?

A No, I don't.

Q Or from 1953?

A No.

Q You just have last year and this year?

A Yes, sir.

Q Well, do you have the sales records of the other city salesmen for similar periods?

A I don't have them with me, no.

Q You didn't bring those?

A No.

Q Were they down or up, or have you checked them to find out?

A I would really have to check them, but I would say they were up, in that our over-all volume of business was up for the first two months.

Q Your volume of business for the whole territory, that is in and out of the city?

A For our entire operation in Memphis.

Q Well, you are not prepared to say then whether Mr. May's production for January and February of 1956 is below 1954, or 1953, but just that it is below 1955?

A That's right.

Q That is still a considerable amount of sales, isn't it, Mr. Flagg?

A It is.

Q You wouldn't call him a sorry salesman on the basis of $62,767.00 for those two months?

A No, but I would say this, that Charlie May has built up a fine following among his customers, which I think partly reflects in a still substantial volume, plus the fact that while Charlie has not been able to concentrate on his customers during this period, since the middle of July, he has had help from the management inside.

Q That's right, and when his customers place an order, he gets credit for it, whether he actually solicits the order?

A Very true.

Q Now, you say Mr. May had to work a 10-hour day before the accident, I believe you said ten hours each day?

A I didn't say that he had to work ten hours a day; I presume that he would put in a day that would average ten hours; he was very active in the Electric League, he was president of that organization, which is an organization of

electrical contractors and distributors here in the City of Memphis; that was business in part, plus the fact that he would continue to bring blue prints home with him to make these take-offs; it is a presumption on my part, but I believe that he must have come up pretty close to a 10-hour day.

Q You don't know that he was working that many hours?

A No.

Q You just figure there was so much that he was doing—,

A Well, I have seen the work that he produced that night, the next morning.

Q Do you know anything about the other outside activities, like playing soft ball and volley ball and basket ball, and hunting and fishing?

A I know that Charlie May has been active in sports, but I haven't been fishing with him for eight or nine months, ten months I guess, or eleven months.

Q You can't work a 10-hour day and go fishing can you?

A You can on Saturday.

MR. FLOYD: That is all. (Tr. p. 68-72).

(Witness excused.)

* * * * *

Stipulation

STIPULATION
Filed February 29, 1956

It is stipulated and agreed by and between the respective parties to this cause, as follows:

1. Charlie E. May, age 28, has a life expectancy of 36.7 years.

2. The damage to Charlie E. May's automobile, as a result of this collision, amounts to $1110.00.

3. Medical, hospital, drugs and doctors expenses for treating Charlie E. May, through January 6, 1956, for injuries resulting from this collision are as follows:

Drugs	$ 7.74
Back Brace	20.60
Methodist Hospital	39.50
Dr. Robin F. Mason	15.00
Dr. Robert Raskind	555.00
St. Joseph Hospital	587.20
Total through January 6, 1956	$1225.04

The above stipulations of fact may be introduced as evidence on the trial of this cause. The right is reserved to either party to introduce supplemental or elaborating evidence on the trial.

Dated this February 29, 1956.

ELLIS TRUCKING CO. INC.
By FERBER S. FLOYD
Attorney for Defendant
CHARLIE E. MAY
By JOHN B. MACK
Attorney for Plaintiff.

(Item 3, p. 1-2)

DIRECT EXAMINATION
BY MR. CLIFTON:

Q You are Mrs. Lucile Maley?

A I am. (Tr. p. 73) * * *

Q Do you live in Memphis now, Mrs. Maley?

A Yes, I do.

Q And I believe that you are a nurse?

A I am a licensed practical nurse.

Q And you have been engaged in that occupation now for about thirty years?

A Yes, sir.

Q And for possibly the last thirteen or fourteen years here in Memphis, Tennessee?

A It will soon be fourteen years. (Tr. p. 73) * * *

Q What relation are you to Mr. Charles E. May, the plaintiff in this case?

A I would like to say my son, but he is my son-in-law.

Q Is your relation with Mr. May and his family close?

A Very close.

Q Are you in their home a great deal?

A I am in their home almost as much as I am in my apartment, and I have lived with them at different times.

Q This accident in this case occurred on July 13, 1955; now, before this accident, was Mr. May of a happy disposition or not?

A He certainly was, very much so, always jolly and teasing me, and a lot to say, and a lot of fun.

Q Was he of a complaining nature about anything?

A No, he doesn't complain; he seldom ever complains. The only way I know when he is uncomfortable or in pain is when you watch him when he doesn't know you are watching him.

Testimony of Mrs. Lucile Maley — Direct

Q Prior to the accident, was Mr. May devoted to his work, and explain it if you will?

A Yes, he was very much so; he was a hard worker. In fact, I cautioned him several times to slow down; he liked his work and he worked hard.

Q Did he do some work at home after he left the office?

A Well, I have seen him work as late as 10:00 o'clock at night in his yard and on the flowers, and they bought a little home and he has worked as late as 10:00 o'clock at night out there; he has lights out there, and he is always doing something.

Q Did Mr. May prior to this accident engage in any outdoor activity such as hunting and fishing?

A Oh yes, he played ball and he hunted and fished, which he hasn't been able to do since; he played with the children and romped with the little boy, which he can't do any more. The fact of the business is that they hesitate to greet him like they used to, or to go get up in the chair with him or in his lap; they hesitate, afraid they will hurt him because they have to be so careful, and they are so small, it is pathetic sometimes.

Q Has the older child made some remark about it?

A I have heard him say, "Be careful, Pam; don't hurt daddy."

Q Mrs. Maley, in your observation of Mr. May prior to the accident, was he erect in his carriage and active in his working?

A Oh, yes, yes; he would get down on the floor and wrestle with the little boy, he was very active, but now if he stoops to pick up something, he holds on to another chair and pulls himself up, and he comes in in the afternoon and he can't straighten up at all; and he is exhausted, he can't

eat a lot at night. He sits at the table and he doesn't eat, and maybe two or three hours later he will go back and eat something. I have known him since, to get up at 1:00 o'clock and go drink a glass of milk; he is highly nervous; a lot of nights he can't sleep; he is up three or four times at night.

Q Mrs. Maley, in your experience in thirty years of nursing, have you had occasion to observe patients who have had back injuries and herniated disk injuries?

A Well, I have had a few friends that have had that kind of operation. I know that they have never been completely exactly the same.

MR. FLOYD: If your Honor please, we object to that.

THE COURT: Objection sustained.

Q Does Mr. May have any particular thing that he has to put in his bed to sleep on?

A He sleeps on boards, yes, sir; it is more comfortable for him.

Q Now, Mrs. Maley, at times when Mr. May would not be aware that you were watching him, have you observed him give evidence of pain, and if so, describe it.

A Yes, I have; I have watched him when he is reading the paper and he shifts his position every little bit; he doesn't seem able to get comfortable.

Q Can Mr. May do any lifting at all of the children, or help around the home?

A No, he doesn't attempt to lift them.

Q You say Mr. May doesn't complain?

A Well, he is not the complaining type; I will ask him sometimes if he is hurting, and he will say, "Oh, a little bit, mama," but other than that, he doesn't have too much to say; he will say sometimes that he didn't sleep well.

Q Does he attempt to go on about his work?

A Oh, yes, he goes to work.

Q Does he attempt to help around the house?

A No, not any more; he used to, but he doesn't any more

MR. CLIFTON: I believe that is all.

MR. FLOYD: No questions. (Tr. p. 74-77) * * *

* * * * *

DIRECT EXAMINATION
BY MR. MACK:

Q You are Mrs. Ann May?

A Yes, sir.

Q The wife of Charlie May?

A Yes.

Q And the daughter of Mrs. Maley?

A Yes. (Tr. p. 78) * * *

Q And do you have children?

A Yes, I have three children, a little boy, six, and a little girl, four, and a little baby two and one-half months old.

Q When was that baby born?

A December 20.

Q Mrs. May, prior to the accident in which your husband was involved, would you explain to the jury in your own words the type of person he was?

A Well, he was very happy and he always played with the children and worked around the house, and worked in the yard, and he was just able to do most anything; he played ball, he played football.

Q Did he make a good husband?

A Yes, sir, fine.

Q And you stated he worked around the house?

A Yes, sir.

Q Was he active in sports?

A Yes, sir.

Q Was he active in any organization?

A Yes; he belongs to the Oriental Band in the Shrine and he was president of the Electric League.

Q Is that Electric League an organization that is associated with his business?

A Yes, sir, it is.

Q Had Mr. May had any illnesses or injuries to his back or his legs, or anything, prior to this accident?

A No, sir, not at all.

Q And this happened in 1955, and you married in 1948?

A Yes, sir.

Q Had he ever complained of having pain very much during that time?

A No, he didn't; he was always very well; he never had any sickness at all.

Q Did he consult doctors?

A No, sir.

Q Did he miss very much time from work?

A Not unless he was just too sick to go, with the flu or something like that.

Q He had the ordinary colds and the flu or something?

A Yes, sir.

Q But he never had any pain in his back or legs?

A No, sir, not at all.

Q Did you all go out together socially?

Y Yes, quite often; we went dancing, and to parties.

Q And did you have people over at your house often?

A Yes, sir, quite often.

Q Now, Mrs. May, since this accident in July, 1955, have you noticed any change in his activities?

A Quite a bit; he is not able to do any work around the house or in the yard, and he doesn't play with his children any more, and he can't pick them up, and of course if they start to get in his lap, he is not able to move too much.

Q Does he try to play with them?

A Yes, he does try, but he just can't do anything that he did.

Q Is he able to pick up the children?

A No, sir.

Q Can he lift the baby?

A No, sir, he hasn't lifted him; he has to sit down and somebody else give him the baby, usually.

Q And I believe you said the baby was born December 20?

A Yes, sir.

Q Has he been very active in his organizations, like the Electric League and the Shrine since the accident?

A Well, he has missed all the Shrine conventions, most all of the meetings and he hasn't been able to attend band practice regularly, and he has missed some of the Electric League meetings.

Q Have you had much social life since the accident?

A No, sir, we haven't; we have been to one party since he had the accident.

Q And when was that?

A February 26, I think.

Q And at that time, was he able to participate in the party normally?

A No, sir; we tried to dance one dance, and he just wasn't able to; he said his back and legs hurt too bad.

Q Mrs. May, has your husband tried to carry on his normal life since the accident?

A Well, he tries, but of course he is awfully nervous and irritable at times, his back hurts him all the time.

Q Has his disposition changed?

A Yes, quite a bit; he doesn't seem to be as happy as he was, and he doesn't take an interest in things like he did.

Q Have you noticed any effect on the children?

A Yes, quite a bit; of course, they miss him playing with them quite a bit, and my little boy always tells him he is not able to play with him any more, like he was.

Q Have you noticed any effect on Mr. May because of not being able to play with the children?

A Yes, sir, I think so because he always enjoyed playing with them; of course, he got out in the yard and played ball and football with them, and all, and now he is not able to do that.

Q When your husband was first injured in July, and during the course since that time, have you been with him a good deal of the time?

A Yes, most all the time.

Q Have you observed his condition during those periods of time?

A Yes, sir.

Q And would you tell the jury just in your own words what has happened since July 13 and up to the present time?

A Well, he always has been in pain; you can look at him and tell he is hurting, and if he moves in the chair, it is always with a look of pain on his face; he can't bend over and if he stoops down, he has to hold to something to get up, and he doesn't do anything at all unless he just has to do it.

Q When he came out of the hospital after that first day in August, did he attempt to carry on his normal activities?

A Yes, he tried, but he just wasn't able to do it.

Q Were you with him in the hospital in September when he had that myelogram run?

A Yes, I was.

Q Were you with him that day?

A Yes, sir.

Q Would you describe to the jury his condition that day, and for several days following?

A Well, he had a very bad headache after the myelogram, and for two or three days afterwards, and then they put him back in traction, which was very painful, too.

Q Now, when he came out of the hospital after the myelogram in September, I believe he wore this back brace?

A Yes, sir.

Q During that period of time, did he talk with you about having this operation?

A Yes, he did, quite often.

Q Did you notice his reaction to the operation?

A Well, he tried to do everything before he would have the operation; he wanted to do everything else first, to see if it would help, but the doctors said there wasn't anything else for him to do but to have the operation, after they had done all this other.

Q Did he try to postpone the operation for any particular reason?

A Yes; our baby was due in December, and he wanted to wait until afterwards if he could, but the doctor advised him to go ahead and have it done.

Q Now, during the course of time he went into the hospital, it was the end of November, I believe?

A Yes, sir.

Q And did you stay with him part of the time over there in December?

A Yes I did, most of the time.

Q Will you describe to the jury his condition in the hospital after the operation?

A Well, he was in severe pain for three or four days, and he just felt terrible and he had headaches, too, and it was very bad.

Q Now, after the operation and when he came home, was he able to drive a car?

A No, sir, not at all, and I wasn't able to drive, and when I was in the hospital he had to ask the neighbors or somebody to bring him to the hospital; everywhere we went, we had to ask somebody to take us.

Q After the operation and in January when he went back to work, did he try to do his normal work there, in January and February?

A Yes, he did; he went back in the hope of being able to go back to where he left off in July, but he was not able to do it.

Q Would you describe to the jury his progressive condition during January, February and March?

A Well, he has been in pain every day, and at night when he comes home, he is just so tired he doesn't feel like eating a lot of times, and he is not able to work at night like he was before, and he is not able to sleep at night, a lot of nights.

Q He went back in the hospital March 9?

A Yes.

Q What was his condition at that time?

A Well, he was still having a lot of pain in his back and his leg was still bothering him, and he still is not able to do anything at all.

Q Have you noticed any change of condition since the operation, as against before the operation?

A I can't see much difference; he is still having a lot of pain.

Q Does he appear to be about the same as he was before?

A Yes, sir. (Tr. p. 78-86) * * *

Q Mrs. May, where did your husband go last night?

A He went back to the hospital after he left here.

Q Did you carry him back there?

A Yes, I did.

Q Was that under doctor's orders?

A Yes, sir, he was to return right to the hospital.

Q And this evening, where will he go?

A Back to the hospital.

MR. MACK: I believe that is all.

MR. FLOYD: No questions. (Tr. p. 87)

• • • • •

CHARGE OF THE COURT

THE COURT: * * * Members of the jury, the plaintiff in this lawsuit contends that the defendant is liable to him in damages by reason of the direct and proximate negligence of the latter's driver or operator on the afternoon of July 13, 1955, when the defendant's tractor-trailer unit ran into the rear of the plaintiff's automobile on South Third Street, in the City of Memphis, with the result that the plaintiff was seriously, painfully and permanently injured.

(Tr. p. 88) * * *

If, after considering the instructions of the Court and the evidence in this case, you find the issues in favor of the plaintiff, then it is my duty to tell you what damages the plaintiff is entitled to recover.

The plaintiff, Mr. May, would be entitled to recover an amount which you say would fairly and adequately compensate him for the personal injuries which you find were negligently inflicted upon him, taking into consideration the nature and extent of the injuries, their kind, character and duration, it being the purpose of this litigation to settle for one and for all for the injuries and damages sustained by the plaintiff.

You will take into consideration the plaintiff's age and expectancy, his habits and disposition to labor, the amount of mental and physical pain, if any, he has suffered due to his injuries, or will suffer in the future, the reasonable amounts he has contracted to pay, or has paid, for hospital, doctors' bills and any other epxenses necessary to relieve him of said injuries.

You will also consider the amount which would fairly compensate him for the loss of earnings, if he has shown any, the compensation, if any, he will lose by reason of his loss of power to earn, or loss, if any, as a result of his injuries incapacitating him from following his usual vocation; the cardinal rule being that you should fairly and impartially determine what would be a fair and reasonable compensation for the injuries inflicted upon the plaintiff, taking into consideration the various elements I have called to your attention, provided, of course you find the plaintiff is entitled to recover. I might say here before allowing for alleged future permanent disability you must find with reasonable certainty that such disability will actually result.

Compensation for the injury and its results is what the law awards in all such cases, but the law affords no fixed rule by which you can estimate with exact certainty the compensatory damages allowable in such cases. The law commits the determination of such elements of damages to the wise discretion of the jury under the evidence, enjoining upon the jury the exercise of sound judgment, free from passion and prejudice.

In addition to the foregoing, the plaintiff, Mr. May, would be entitled to recover an amount which would fairly compensate him for the damage to his automobile. In this respect, I instruct you that the damages which the plaintiff May would be entitled to recover is the amount shown by the preponderance of the evidence to be the reasonable cost of repairing his car following the collision and placing it in substantially the same condition it was in before it was damaged in the collision. The lawyers in this case, as you understand, however, have stipulated the reasonable repairs

to the plaintiff's car in this case was $1,110.

(Tr. p. 94-96) • • •

THE COURT: While we are about it, do you want to state the reason for the exception to the Court's failure or refusal to give the two special requests tendered?

MR. FLOYD: Yes, if the Court please. First I want to make one exception to the general charge, which I can do very briefly.

THE COURT: All right.

MR. FLOYD: The defendant excepts to that portion of the general charge in the stating of the plaintiff's theory, and in stating the elements of damage which it permitted the jury to include in their award for the plaintiff any element of damage—

THE COURT: (Interrputing) Listen to this, Mr. Clifton.

MR. FLOYD: Any element of damage for permanent disability or loss of earning capacity as a matter of law.

At this time the defendant excepts to the refusal of the Court to give its special requests numbered 1 and 2, which are similar and pertaining to the same matter, because they correctly state the law in Tennessee on the question of damages for permanent injuries, and the proof in the case was not sufficient to allow the jury to consider the question of permanent injuries, and therefore these instructions should have been given to the jury.

THE COURT: Do you agree with him on that, Mr. Clifton?

MR. CLIFTON: No, sir.

THE COURT: Mr. Floyd, your exception is to the Court's statement of the plaintiff's theory to the jury, and that is in what respect?

MR. FLOYD: Only where your Honor said that the plaintiff contends that he suffered permanent injury, and then you go on to say if you find plaintiff's contention correct they will find for the plaintiff.

THE COURT: Is that all, gentlemen?

MR. FLOYD: Yes sir. (Tr. p. 97-99) * * *

JURY VERDICT
Filed March 15, 1956

We, the jury for our verdict say:

We find in favor of the plaintiff, Charlie E. May, and against Ellis Trucking Company, Inc., and assess personal injury damages in the amount of $42,500.00.

This 15th day of March, 1956.

MILTON H. SMITH, JR.
Foreman

We find in favor of the plaintiff and assess property damage in the amount of $1,110.00.

This 15 day of March, 1956.

MILTON H. SMITH, JR.
Foreman

(Item 6)

Judgment on Jury Verdict

JUDGMENT ON JURY VERDICT

Filed March 16, 1956

This cause came on for trial before the Court and Jury on Wednesday, March 14, 1956, the plaintiff appearing in person and by counsel, and the defendant by its duly accredited representative and by counsel, and the issues joined having been duly tried, and the jury having rendered a verdict on Thursday, March 15, 1956, that the plaintiff have and recover of the defendant, Ellis Trucking Co. Inc. the sum of $42,500.00 for personal injuries, and $1110.00 for property damages,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED

That the plaintiff, Charlie E. May, recover of the defendant, Ellis Trucking Co. Inc., the sum of $42,500.00 as compensatory damages for personal injuries, and the sum of $1110.00 for property damages, all with interest at the rate of 6% per annum from the date of entry hereof, and all costs of this action, for which plaintiff shall have execution.

This the 16th day of March, 1956.

MARION S. BOYD
Judge

(Item 7, p. 1-2)

Defendant's Motion for a New Trial

MOTION FOR A NEW TRIAL

Filed March 22, 1956

Comes now the defendant and moves the Court to set aside the verdict of the jury and the judgment of the Court entered thereon and to grant it a new trial upon the following grounds:

I.

There is no material evidence to support the verdict.

II.

The verdict of the jury is contrary to the greater weight and preponderance of the evidence.

III.

The verdict of the jury is excessive.

IV.

The verdict of the jury is so excessive as to evince passion, prejudice or unaccountable caprice on the part of the jury.

V.

The Court erred in charging the jury as a part of its general instructions, as follows:

> "Members of the Jury, the plaintiff in this lawsuit contends that the defendant is liable to him in damages by reason of the direct and proximate negligence of the latter's driver or operator on the afternoon of July 13, 1955, when the defendant's tractor-trailer unit ran into the rear of the plaintiff's automobile on South Third Street, in the City of Memphis, with the result that the plaintiff was seriously, painfully and permanently injured."

This was in error because it instructed the jury to consider that the plaintiff had been permanently injured, although there was no testimony introduced to the effect that he had sustained any injury of a permanent nature. The defendant seasonably excepted to this portion of the Court's charge and its exceptions were noted in the record.

VI.

The Court erred in instructing the jury with regard to the elements of damage which they should consider in the event they found for the plaintiff, as a part of its general instructions to the jury, as follows:

> "The plaintiff, Mr. May, would be entitled to recover an amount which you say would fairly and adequately compensate him for the personal injuries which you find were negligently inflicted upon him, taking into consideration the nature and extent of the injuries, their kind, character and duration, it being the purpose of this litigation to settle for once and for all for the injuries and damages sustained by the plaintiffs.
>
> You will take into consideration the plaintiff's age and expectancy, his habits and disposition to labor, the amount of mental and physical pain, if any, he has suffered due to his injuries, or will suffer in the future, the reasonable amounts he has contracted to pay, or has paid, for hospital, doctors' bills and any other expenses necessary to relieve him of said injuries.
>
> You will also consider the amount which would fairly compensate him for the loss of earnings, if he has shown any, the compensation, if any, he will lose by reason of his loss of power to earn, or loss, if any, as a result of his injuries incapacitating him from follow-

ing his usual vocation; the cardinal rule being that you should fairly and impartially determine what would be a fair and reasonable compensation for the injuries inflicted upon the plaintiff, taking into consideration the various elements I have called to your attention, provided, of course, you find the plaintiff is entitled to recover. I might say here before allowing for alleged future permanent disability you must find with reasonable certainty that such disability will actually result."

This instruction was erroneous because it instructed the jury to consider damages for permanent injuries, whereas, there was no evidence in the record that the plaintiff had, or would, sustain any permanent injury or disability. The defendant seasonably excepted to this portion of the Court's charge and its exceptions were noted in the record.

VII.

The Court erred in refusing to instruct the jury in accordance with defendant's Special Request No. 1, which is as follows:

"Gentlemen of the Jury:

If you find by the greater weight and preponderance of the evidence in this case that the plaintiff is entitled to a verdict against the defendant, you are instructed that your verdict in favor of the plaintiff should not include any allowance for alleged permanent injuries suffered by the plaintiff, because the plaintiff has failed to prove by a reasonable certainty that he has, or will, suffer any permanent disability as a result of his injuries."

This constituted prejudicial error on the part of the Court, because of the above quoted instruction correctly stated the law in Tennessee on the question of damages for permanent injuries and the proof in the record was not sufficient to allow the jury to consider or speculate upon the question of permanent injuries.

VIII.

The Court erred in refusing to instruct the jury in accordance with defendant's Special Request No. 2, which is as follows:

"Gentlemen of the Jury:

In the event you find in favor of the plaintiff, you will not include in your verdict any award for permanent injuries."

This constituted prejudicial error on the part of the Court, because the above quoted instruction correctly stated the law in Tennessee on the question of damages for permanent injuries and the proof in the record was not sufficient to allow the jury to consider or speculate upon the question of permanent injuries.

WHEREFORE, the defendant prays that the verdict of the jury and the judgment of the Court entered thereon, be set aside and the defendant be granted a new trial in this case.

NELSON, NORVELL & FLOYD
Attorneys for Defendant
1001 Columbian Mutual Tower Building
Memphis, Tennessee

Notice of Motion

NOTICE OF MOTION

To Clifton and Mack, Attorneys at Law, Exchange Building Memphis, Tennessee.

Please take notice that the foregoing Motion will be brought on for hearing on Friday, March 30, 1956, at 9:30 a.m. or as soon thereafter as counsel can be heard.

FERBER S. FLOYD of Counsel for Defendant.

I, Ferber S. Floyd, certify that I am one of the attorneys for the defendant in the above styled cause and that I have this the 22nd day of March, 1956, served a copy of the foregoing Motion for a New Trial on Clifton and Mack, Attorneys for the plaintiff, by placing same in an envelope addressed to them at their offices in the Exchange Building, Memphis, Tennessee, and deposited said envelope in the United States mail.

FERBER S. FLOYD

(Item 8, p. 1-4)

Defendant's Argument on Motion for a New Trial

ARGUMENT ON MOTION FOR NEW TRIAL

In this cause, on May 4, 1956, Argument on Motion for New Trial in behalf of the Defendant was presented to the Court by Mr. Ferber Floyd, and proceedings were had in part, as follows:

THE COURT: All right, Mr. Floyd, the Court has read your motion.

MR. FLOYD: Yes, sir, this motion—

THE COURT: I am interested to hear primarily on the question of whether or not this was an excessive verdict.

MR. FLOYD: All right, that is of course the principal question.

I have stated here there is no material evidence to support the verdict. By that I mean there is no material evidence to support a verdict in the amount in which it was returned. I did not and never did feel that the defendant should have had a verdict in the case. I don't think I took that position to any strenuous extent in the trial of the case.

Your Honor will recall the case was tried in March, and motion has been pending,—for one reason or another,—and couldn't get to it.

The verdict, as Your Honor will recall, in so far as personal injury is concerned,—the only thing involved, we think, here was the amount of forty-two thousand five hundred dollars, which is a higher verdict for anything of a similar nature in this locality that I have ever heard of or been able to discover.

Defendant's Argument on Motion for a New Trial

The plaintiff did have a substantial injury. The doctor's testimony was that he had two ruptured discs, which were surgically removed. He was in the process of recovering from his operation, which has only been done at the end of November or first of December. And this action was tried the middle of March. At the time of the trial he had some stiffness in his back, but the doctor said he was giving him physio-therapy, and was getting his weight down so he could complete his recovery. The doctor did not attempt to testify that this man had any permanent disability. He said it was too soon after the operation to say what, if any, disability he had. That some patients had some disability and some got over injuries of this kind entirely.

Mr. May had some twelve hundred dollars in medical expense. There was a claim of some loss of earnings, which are of a highly speculative nature. But the only possible way that a verdict of this size could in any sense be justified would be for there to be some proof of a very, very definite impairment of earning capacity on a permanent basis in the future. There is no evidence whatever in the record of any such impairment.

Now, I concede that he had an injury, and that he had an operation which is not to be sneezed at. And I don't intend to belittle it whatever. On the record in the case he would be entitled to substantial damages. But damages in the sum of forty-two thousand five hundred dollars, and no proof of permanent disability, could not and cannot be justified.

Your Honor is familiar with other cases which I have discussed locally, and I say this is far in excess of anything that a jury has ever returned for this type of case in this locality.

Defendant's Argument on Motion for a New Trial

We had a case tried in Your Honor's court about a week or so before this one, I believe, where the verdict was twenty-seven thousand dollars, which was reduced by agreement to twenty-four thousand dollars. There was the McIntyre case which later one feature of was tried in this court, against Commerce Title Guaranty Company,—a verdict of twenty-two thousand five hundred dollars. Another case that was tried in this court by the same counsel in this case was the 7-Up case, where the verdict was twenty-two thousand five hundred dollars for injury of similar nature without an operation. There was another case that I had against the Telephone Company where there was a verdict on injuries of similar nature of twenty-five thousand, which Judge Adams of Division One of the Circuit Court reduced to twenty, and it was later compromised. There was a case against Yellow Bus Lines,— Brenner,— that went up from Division Two of the Circuit Court, where the verdict was the sum of twenty-five thousand dollars, which was reduced on motion for new trial to sixteen thousand five hundred dollars, there was a fractured shoulder with twenty-five per cent disability and a ruptured disc which had not been operated on, but operation was contemplated at the time of the trial. Both sides appealed from the motion for new trial, and the Appellate Court overruled all assignments on the part of both sides, and affirmed the verdict at sixteen thousand five hundred dollars.

I believe that is all of the cases I know of involving injuries of a similar nature where there have been substantial verdicts. There have been others involving smaller verdicts, but there is of course no comparison, and I won't go into those.

I think that I must have done something wrong in the

trial of the case, but I have lost a lot of sleep there for the past two months and I haven't been able to figure out yet what it was. But the action of the jury in returning a verdict of this kind is just not —, it is just beyond my comprehension. And I respectfully submit that it was upon unaccountable caprice, if not passion or prejudice.

It is in my opinion undoubtedly excessive.

Now, I have also mentioned in my motion the question of the Court's charge, which I think of course bears upon the excessiveness of the verdict, in that they were permitted to speculate on permanent disability, when under the Reeves against Railroad case I did not think they were entitled to, and I don't believe that the part inserted in the charge would correct that.

THE COURT: Let me see what I said there. We have tried a good many cases since this one.

MR. FLOYD: I will, Your Honor.

MR. CLIFTON: Your Honor said "if any".

THE COURT: What page is that on?

MR. CLIFTON: Your Honor said. "may consider it, if any".

THE COURT: Do you have the Court's charge?

MR. FLOYD: I don't have Your Honor's charge here. I have my motion. Your Honor permitted them to determine whether or not there was any permanent disability.

THE COURT: "I might say here, before allowing for alleged future permanent disability, you must find with reasonable certainty such disability will actually result."

How could you put this to them any stronger than that?

MR. FLOYD: Well, in the Reeves against the Railroad case, it was held that the court could not submit that feature

of it to the jury where the proof failed to measure up to the standard. I think of course in the Reeves case we don't have all the evidence given, but a résumé there said plaintiff had this particular injury and that he might get over it, and he might have it forever. And when you get right down to it and boil Dr. Raskind's testimony down, that is what he says, that at the time he gave his deposition he just did not know.

So I don't think we had any evidence of any permanent disability that measured up to the standard where it was worthy to be submitted to the jury; to permit the jury to pass on the question of whether it was permanent to a reasonable certainty.

I think that the requests submitted by the defendant,— there are two of them there pertaining to the question of permanent injuries, should have been given to the jury. And I believe that would have kept them from going as far astray as they undoubtedly did.

The question of property damage of course is not involved here. It is simply the forty-two thousand five hundred dollars for personal injuries, which would be justified if there was proof of some great impairment in the earning capacity of this man, which the record in this case is completely void of. Certainly no such verdict would be justified by the pain and suffering and the sum of twelve hundred dollars in medical expenses that he had incurred up to the date of the trial. So, even taking his contentions about the loss of earnings he had incurred at that time, which were of a speculative nature,— because he made more last year even when he was injured than he ever made in his life, and the earnings records show a normal increase over the previous years even during the time he was disabled,

Now, I haven't gone into the cases from other jurisdictions: It is, of course, difficult in a motion of this kind to find some cases on all fours. But I have reminded the Court of all the cases that I know about from this locality involving injuries of a similar nature.

THE COURT: Both of you gentlemen in your memorandums which you were good enough to furnish the Court at the Court's request made reference to the Werthen Bag case—

MR. FLOYD: Yes, sir.

THE COURT:—(continuing)—Where the same—, A similar case to this. The facts surrounding the accidents in the case were the plaintiff's vehicle was rammed from behind, and the verdict in that case was forty-two thousand five hundred dollars. But I don't know,—don't recall just what your views were about that case as expressed in the memorandum. I have forgotten momentarily. But that was quite a different case from this one.

MR. FLOYD: I was not familiar enough with the injuries to discuss the case from that point of view in my memorandum.

THE COURT: Judge Martin set them out in his opinion in the Court of Appeals. Those injuries were very, very serious. But you did mention it, I think in your memorandum.

MR. FLOYD: I did mention it, to set up what our discussion would be in arguing in this court on motion for new trial, and recognizing that the Court did not sit as the thirteenth juror. As I recall, the injuries in the Werthen Bag case were of much more serious and substantial nature than the record in this case discloses that they are here.

Defendant's Argument on Motion for a New Trial

I believe that states about everything that I can state in regard to the verdict. I will be happy to attempt to answer any questions that the Court might care to ask me on it. I am not in a trial or in argument capable of getting excited and wave my hands, but I don't want the Court to think that there is any lack of sincerity in my motion, because I think this is one of the most excessive verdicts that I have ever heard of,—— and certainly the most excessive that I have ever had the displeasure of being involved in on the losing side.

I don't know how to recommend that the Court will go about rectifying it, whether to reduce it or order a new trial in its entirety. It is so far out of line it would be difficult to set an amount which would be proper. I would like to point out, however, that another case arising out of this same accident has been filed since this time, and is presently pending in this court. I don't think justice has been done by the verdict which now stands.

THE COURT: What do you think would be a reasonable verdict in this case?

MR. FLOYD: Since the Court has asked me the point-blank question, I guess I would have to state what we offered in settlement of it.

THE COURT: I wouldn't—, I do not—, wouldn't want to hear that, wouldn't want to hear that.

MR. FLOYD: I think that, taking everything into consideration,— and, of course, if I would have to give plaintiff all benefit of doubt as to his claimed loss of earnings, I think twenty thousand dollars would be a high figure.

(Tr. p. 100-111) • • •

COURT'S OPINION ON MOTION FOR NEW TRIAL

In this cause, on May 4, 1956, the Court, after hearing the argument of counsel on motion of the defendant, ruled as follows:

THE COURT: Well, gentlemen, the motion for new trial is overruled except with respect to paragraphs 3 and 4.

A new trial will not be necessary in this case, but in the Court's opinion the jury's appraisal of the damages was so manifestly excessive that the Court is bound in the interest of justice to order that the excessive portion of it be remitted. This was a monstrous verdict. And I might say here, while the Court is certain there was no dishonest motive insofar as the jury was concerned,— and, incidentally, no such claim is made in this proceeding,— the Court is constrained to say there must have been a misapprehension of the evidence by the jury on the injury and damage question. Certainly there was no rational appraisal of the evidence on the question of damages in the light of what would be reasonable for the injury involved. The evidence,— that is, the substantial evidence, of course, simply is not in the record to support such a verdict as was rendered by this jury. The forty-two thousand five hundred dollar verdict was so excessive as to shock the conscience of the Court. The Court was astonished, I am bound to say, as I think you lawyers were when the jury reported this very large verdict. Never in the Court's experience has a jury in this court been so far off the beam. This jury went haywire, it seems to the Court.

Now, the right of the Court to revise a jury verdict is a delicate one, and one this Court is always slow to exercise.

but justice requires that course in this case. We don't know, and it would be speculative to say, on what definite basis the jury arrived at such a verdict, but it was certainly not on the evidence the Court heard during the trial. There could have been undue sympathy for the plaintiff. We have no way of knowing first hand about that. At any rate, it was so excessive as to evince passion, prejudice and caprice on the jury's part, and the Court's duty in the matter is very plain.

Now, of course the Werthen Bag case cited by both sides was very different, as a review of the injuries by Judge Martin in the Court of Appeals opinion will show. Incidentally, the accident in that case happened about like this one. The plaintiff's car was rammed from behind, and there was little or no question about the liability. We don't get too much help from other jury verdicts on the question of excessiveness, but the substantial evidence in the Werthen Bag case was there in abundance to support every penny the jury awarded that plaintiff. The injuries in that case were very severe indeed. A jury in this court, in the most recent case of the type here, the Amick case, a case very similar from the standpoint of injuries, involving this disc injury that we hear so much about these days, awarded fifteen thousand dollars to the plaintiff. But again, as I say, we don't get too much help from other verdicts.

Mr. May, the plaintiff in this case, sustained an injury which made a disc operation necessary, but it would be highly speculative to say he suffered a permanent disability. Dr. Raskind, as the Court has reviewed his deposition very carefully, does not undertake to say the plaintiff will be hampered too much in his work if any as a salesman

And there is other substantial evidence in the record to the same effect, I might say. At the time the doctor's deposition was taken, there was some restricted motion in the lumbar spine, as the Court recalls, but this is a condition which is calculated to clear up very materially, especially when the plaintiff takes off some excessive weight, as Dr. Raskind I believe testified.

The Court regrets the necessity of saying so, but under the evidence, that is, the substantial evidence in the case, it is the Court's view that this verdict should be reduced to twenty-five thousand dollars. After this reduction, it is still a very large verdict.

All right, get up a judgment on that .

MR. CLIFTON: Will Your Honor note our exception to Your Honor's ruling, please. (Tr. p. 113-117)

Final Judgment

ORDER OVERRULING MOTION FOR NEW TRIAL AND DIRECTING REMITTITUR AND FINAL JUDGMENT

Filed May 8, 1956

This cause came on to be heard on Friday, May 4, 1956, upon a motion for a new trial duly filed herein by the defendant, Ellis Trucking Co., Inc., upon briefs, and upon arguments of counsel in open Court, and upon the entire record in this cause, from all of which it is Considered, Ordered and Adjudged by the Court:

A motion for a new trial is overruled except with respect to Paragraphs III and IV.

The Order heretofore entered on the jury's verdict awarding judgment against the defendant, Ellis Trucking Co., Inc. for $42,500.00 is hereby vacated and set aside.

A new trial will not be necessary in this case and it is here ordered that the jury's verdict be reduced to $25,000.00.

It is now ordered that on the verdict of the jury rendered herein, the plaintiff, Charlie E. May, have and recover of the defendant, Ellis Trucking Co., Inc., the sum of $25,000.00 as compensatory damages for personal injuries and the sum of $1110.00 as property damages, all with interest at the rate of six (6%) per cent per annum from March 16, 1956, and all the costs of this cause for which plaintiff shall have execution, to all of which action of the Court plaintiff duly excepted and his exceptions are here noted by the Court.

The opinion of the Court is here made a part of the record in this cause.

This 8th day of May, 1956.

MARION S. BOYD,
Judge

Notice of Appeal

NOTICE OF APPEAL

Filed June 4, 1956

Charlie E. May, plaintiff in the above styled cause, hereby gives notice of appeal to the United States Court of Appeals for the Sixth Circuit, from so much of the Order entered in this cause on May 8, 1956, in the United States District Court for the Western District of Tennessee, Western Division, as vacates and sets aside the prior judgment on a jury verdict entered in this cause on March 16, 1956, against the defendant, Ellis Trucking Company, Inc., directs a remittitur and enters final judgment on the personal injury verdict of the jury, as remitted, to Twenty-Five Thousand ($25,000.00) Dollars.

Plaintiff tenders herewith its bond for costs on this appeal, and said bond is filed with this Notice of Appeal.

This June 4, 1956.

CHARLIE E. MAY

by JOHN B. MACK

Attorney for Plaintiff
1814 Exchange Building
Memphis, Tennessee

(Item 10)

Appeal Bond

Filed June 4, 1956

KNOW ALL MEN BY THESE PRESENTS, That we, Charlie E. May, as principal and John B. Mack, as surety are held and firmly bound unto Ellis Trucking Co., Inc., a Corporation, its executors, administrators, or assigns, in the sum of Two Hundred Fifty ($250.00) dollars, lawful money of the United States of America, to be paid unto the said Ellis Trucking Co., Inc., a Corporation, its executors, administrators, or assigns, to which payment well and truly to be made, we do bind and oblige ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 4th day of June, A. D. 1956.

WHEREAS, the above-named Charlie E. May heretofore is a citizen of the State of Tennessee, has filed Notice of Appeal from the United States District Court, in and for the Western District of Tennessee to the United States Court of Appeals for the Sixth Circuit against the said Ellis Trucking Co., Inc., a Corporation.

NOW THEREFORE THE CONDITION OF THIS OBLIGATION is such that if the said Charlie E. May shall prosecute his Appeal to effect and shall pay costs if the Appeal is dismissed or the judgment affirmed, or such costs as the said United States Court of Appeals may award against the said Charlie E. May if the judgment is modified or in any other event, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

CHARLIE E. MAY,
by JOHN B. MACK, Attorney (Seal)
JOHN B. MACK, Surety (Seal)

STIPULATION OF PARTIES AS TO TRANSCRIPT OF TESTIMONY

Filed June 20, 1956

In this cause, the parties hereto, by their respective counsel of record, hereby stipulate that the testimony of Charlie E. May, Dr. Robert Raskind, John Flagg, Mrs. Lucile Maley and Mrs. Charlie E. May and the stipulation of the parties heretofore filed on February 29, 1956, is all the evidence in this case that is necessary for a hearing of this cause on appeal to the United States Court of Appeals for the Sixth Circuit.

This 20th day of June, 1956.

CLIFTON & MACK,
JOHN B. MACK,
Attorney for Plaintiff-Appellant

NELSON, NORVELL & FLOYD,
Attorneys for Defendant-Appellee

(Item 14)

Order Extending Time for Filing Record and Docketing Appeal

ORDER EXTENDING TIME FOR FILING RECORD AND DOCKETING APPEAL

Filed June 29, 1956

On application of Charlie E. May, plaintiff-appellant, and by agreement of counsel, the Court being fully advised,

IT IS ORDERED that the time for filing the record on appeal with the United States Court of Appeals for the Sixth Circuit, and for docketing therein the appeal taken by plaintiff by notice of appeal filed June 4, 1956, is extended to and including September 1, 1956, pursuant to Rule 73(g) of the Federal Rules of Civil Procedure.

This 29th day of June, 1956.

MARION S. BOYD,
District Judge

(Item 16)

Approved:

CLIFTON & MACK,
JOHN B. MACK,
Attorneys for Plaintiff-Appellant

NELSON, NORVELL & FLOYD,
Attorneys for Defendant-Appellee

Office - Supreme Court, U.S.
FILED
JUN 3 1957
JOHN T. FEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1956

No. ~~1958~~ 160

CHARLIE E. MAY,
Petitioner

vs.

ELLIS TRUCKING CO., INC.
a Corporation,
Respondent

PETITION FOR WRIT OF CERTIORARI TO REVIEW THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CLARENCE E. CLIFTON
JOHN B. MACK
1814 Exchange Building
Memphis, Tennessee
Attorneys for Petitioner

Of Counsel:
CLIFTON & MACK
1814 Exchange Building
Memphis, Tennessee

The Daily News, Memphis, Tenn. 5/30/57—50

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1956

No.

CHARLIE E. MAY,
Petitioner

vs.

ELLIS TRUCKING CO., INC.
a Corporation,
Respondent

PETITIONER'S JURISDICTIONAL STATEMENT

ON PETITION FOR WRIT OF CERTIORARI FROM THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

In compliance with Rule 23 of the Rules of the Supreme Court of the United States as amended, Petitioner files this, its Petition for Writ of Certiorari, to review the judgment of the United States Court of Appeals for the Sixth Circuit entered March 6, 1957, which set aside the Order of the District Court of the United States for the Western District of Tennessee entered May 8, 1956 and remanded the case to the trial Court for a reconsideration by the trial Court of the Motion for New Trial filed by the defendant-respondent.

Petitioner submits this statement to show that the Supreme Court of the United States has jurisdiction of this Petition for Writ of Certiorari and that substantial federal questions are presented whereby Petitioner has been deprived of his constitutional right to trial by jury guaranteed

to him under the VII Amendment to the Constitution of the United States.

OPINIONS BELOW

The Opinion and Judgment of the United States Court of Appeals for the Sixth Circuit is not yet reported in the Federal Reporter; however, it is set forth in Appendix A hereto, pp. 43.

The Order of the United States District Court for the Western District of Tennessee Overruling the Motion for New Trial and Directing Remittitur and Final Judgment is set forth in Appendix B hereto, pp. 44.

GROUNDS UPON WHICH JURISDICTION IS INVOKED

A. JUDGMENTS TO BE REVIEWED

1. The United States Court of Appeals for the Sixth Circuit entered a judgment setting aside the judgment of the United States District Court for the Western District of Tennessee (App. 105a) and remanded this case to the District Court for a reconsideration of the Motion for New Trial (App. 90a) filed by defendant-respondent. This judgment is dated and was entered on March 6, 1957, a copy of which is made Appendix A hereto, pp. 43.

2. The United States District Court for the Western District of Tennessee, upon Motion for New Trial filed by defendant-respondent, entered an Order overruling Motion for New Trial and Directing Remittitur and Final Judgment on May 8, 1956, dated the same day, a copy of which is made Appendix B hereto, pp. 44.

B. STATUTORY PROVISIONS CONFERRING JURISDICTION

1. The jurisdiction of the Supreme Court of the United

States to review the decision and judgment of the Court of Appeals as well as the District Court by Writ of Certiorari is conferred by Acts of Congress, June 25, 1948, c. 646, 62 Stat. 928.

Title 28 United States Code, Section 1254 (1)

2. Jurisdiction is also conferred by the provisions of Supreme Court Rule 19 (1)(b).

QUESTIONS PRESENTED FOR REVIEW

1. Did the action of the District Court, upon the hearing of respondent's Motion for New Trial, in reweighing the evidence submitted to the jury on the factual question concerning the permanent nature of petitioner's personal injuries, and deciding this fact question contrary to the jury's decision of the same (App. p. 102a-104a), invade the province of the jury and deny petitioner his right to a jury trial as guaranteed him by Amendment VII to the Constitution of the United States?

2. Did the District Court in approving the verdict of the jury and stating that a new trial was not necessary in this case (App. p. 102a) and in overruling the Motion for New Trial, directing a remittitur and entering judgment as so remitted so abuse his discretionary powers in acting on a Motion for New Trial as to require the Court of Appeals to exercise its powers of supervision and review over the lower Federal Court?

3. Did the Court of Appeals, in refusing to consider the constitutional issues raised on appeal by petitioner from the District Court's judgment, and in remanding the case to the District Court for a reconsideration of the Motion for New Trial without passing upon the District Court's invasion of the province of the jury and reweighing the evidence in the case, thereby abdicate its function of super-

vising the lower Federal Court, deny Petitioner his right to review on appeal, lend approval to the District Court's action in invading the province of the jury contrary to repeated decisions of this Court and deny Petitioner his right to a jury trial as guaranteed to him by Amendment VII to the Constitution of the United States?

STATUTES INVOLVED

1. AMENDMENT VII—CONSTITUTION OF THE UNITED STATES

> "In suits at common law, where the value in controverty shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

2. ACTS OF CONGRESS, June 25, 1948, c. 646, 62 Stat. 963

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further poceedings to be had as may be just under the circumstances."
>
> Title 28 United States Code, Sec. 2106

STATEMENT OF THE CASE

A. NATURE OF THE ACTION

This is a suit in tort by Petitioner, Charlie E. May, plaintiff in the trial Court, brought against the Respondent, Ellis Trucking Co., Inc., defendant in the trial Court, for property damages and permanently disabling personal in-

juries he sustained arising out of an accident which occurred on July 13, 1955, in Memphis, Tennessee.

B. FEDERAL JURISDICTION

Jurisdiction was founded upon diversity of citizenship between the parties, the plaintiff and defendant being citizens and domiciled in different states, and amount, the matters in controversy exceeding, exclusive of interest and costs, the sum of three thousand ($3,000.00) dollars.

Title 28 United States Code, Sec. 1332 Acts of Congress June 25, 1948, c. 646, 62 Stat. 930

C. THE PLEADINGS

September 12, 1955 Petitioner filed his complaint in the United States District Court for the Western District of Tennessee, setting forth the relevant facts of the case and alleging Common Law negligence (App. 5a-7a); negligence in violating Memphis City Ordinances (App. 9a); negligence in violating Tennessee State Statutes (App. 10a-11a); and alleging that as a direct and proximate result Petitioner's automobile was virtually demolished (App. 11a-12a); and that Petitioner sustained severe, serious and permanent injuries (App. 7a-8a).

October 6, 1955 respondent filed its Answer denying all the allegations of negligence, violation of City Ordinances and State Statutes and the nature and extent of petitioner's personal injuries and property damage (App. 13a-15a).

February 29, 1956 the parties stipulated as to the property damage in the amount of $1110.00 which is not here involved. Petitioner was permitted to amend his original Complaint to show the surgical removal of two ruptured and herniated intervertebral discs from his back (App. 15a-17a).

No other pleadings are relevant or necessary to this hearing.

D. RELEVANT FACTS

On July 13, 1955 at approximately 3:30 in the afternoon the petitioner was proceeding Southwardly down Third Street in the City of Memphis, Tennessee, driving his 1954 Ford automobile. When he arrived at about the intersection of South Third Street and Lucy Street he stopped in the line of traffic behind a Plymouth automobile whose driver had indicated he was going to make a left turn onto Lucy Street. While the petitioner was so stopped the respondent's 1952 International tractor-trailer truck, driven by respondent's employee, John R. Pruett, rammed the petitioner's automobile from the rear knocking the petitioner's automobile into the Plymouth automobile in front of him and off to the side where petitioner ended up some 150 feet from the point of impact.

As the direct and proximate result of this collision petitioner's automobile was completely demolished and he was very seriously and permanently injured.

Liability of the respondent was conceded without fault upon the part of petitioner as is stated by respondent's counsel: "I did not and never did feel that the defendant (respondent) should have a verdict in the case". (App. 93a). The issue of liability was not raised by respondent on its Motion for New Trial (App. 90a-93a); nor was it raised in the Court of Appeals (App. 106a); and it is not in issue on the Petition for Writ of Certiorari.

E. SUBSTANCE OF THE PROOF

It is not necessary to the issues raised on this Petition to

burden the Court with a recitation of all the proof for the Appendix filed in the Court of Appeals is also filed with this Petition (Supreme Court Rule 21). Respondent introduced only one witness, its truck driver, whose testimony was on the issue of liability which has been conceded. The Petitioner introduced himself, his family and his employer, all of whose testimony is uncontroverted (App. 18a-43a); (63a-84a). Petitioner also introduced the deposition of Dr. Robert Raskind (App. 44a-62a) whose testimony is not controverted by any witness. Dr. Raskind testified that he was the treating neurosurgeon who hospitalized petitioner on four separate occasions for physio-therapy and traction (App. 44a), myelography (App. 48a-49a), surgical removal of two ruptured and herniated intervertebral discs in plaintiff's low back at L4 and L5 inter-spaces (App. 45a), and for further physio-therapy (App. 52a) because petitioner had too much post-operative irritability in his back and had not received the relief Dr. Raskind expected from the disc removals (App. 52a-53a). The testimony of Dr. Raskind is not oral but by way of deposition. He testified that as a result of this operation, in which the two intervertebral discs were removed, the petitioner would not have as good a back as before the operation nor be able to bear the weight he could bear before (App. 59a); that at the time of trial petitioner had a 25% disability of the body as a whole (App. 53a); that he, Dr. Raskind, was not happy with this 25% permanent partial disability as he usually did better than that, usually it is 10% to 15% (App. 61a); and that petitioner would always have a permanent partial residual disability (App. 62a).

Respondent introduced no medical proof even though at the request of respondent petitioner was examined by a physician of respondent's choice who made a report of his examination (App. 36a).

F. PROCEEDINGS

The case came on for trial before the Court and jury, and after the introduction of proof and arguments of counsel was submitted to the jury upon the charge of the Court that they would consider petitioner's future loss of earning capacity, if any, as a result of his alleged future permanent disability (App. 86a) and this over the objection and exception of the respondent (App. 87a-88a).

The jury returned a general verdict assessing petitioner's personal injuries at $42,500 (App. 88a) upon which judgment was entered (App. 89a).

Respondent filed its Motion for New Trial (App. 90a-93a) in which liability was conceded (App. 95a). This Motion for New Trial alleged the Court was in error in submitting to the jury the issue as to whether petitioner had sustained a permanent disability (App. 90a-93a) which was overruled (App. 102a).

The District Court overruled the Motion for New Trial, vacated and set aside the judgment entered on the jury verdict, directed a remittitur reducing the jury verdict to $25,000 and entered final judgment as so remitted by the Court (App. 105a).

Petitioner appealed to the United States Court of Appeals for the Sixth Circuit from so much of the Order of the District Court as vacated and set aside the judgment entered on the jury verdict, directed a remittitur and entered final judgment on the jury verdict as so remitted (App. 106a).

The cause was argued and submitted to the Court of Appeals on February 20, 1957, and on March 6, 1957, a judgment was entered in the Court of Appeals setting aside the judgment of the District Court and remanding the case

to the District Court for a reconsideration of the Motion for New Trial (Appendix A hereto, pp. 43).

This Petition for Writ of Certiorari is filed to review the judgment of the Court of Appeals which refused to consider Petitioner's appeal that he had been denied his right to a jury trial and also to review the action of the District Court in invading the province of the jury and re-weighing the evidence contrary to repeated decisions of this Court.

ARGUMENT

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

The unblemished right to trial by jury is so deeply rooted in the concepts of our heritage as to be the very foundation of our judicial system. Amendment VII to our Constitution is undoubtedly better known than any other provision. And yet, we have reached that improbable impasse here where the trial Court submitted this case to our Constitutionally appointed tribunal to try fact questions and then upon their rendering a decision the trial Judge has redetermined it to suit his own ideas of the facts. The trial Court submitted this case to the jury on the question of permanent injury for them to mete out justice; but, when the jury so evidently found permanent injuries and awarded damages therefor, the trial Court then takes the case away from the jurors and awards damages according to his own ideas of the facts regardless of this act being unconstitutional, unlawful and highly prejudicial to the plaintiff. The trial Court submitted the case to the jurors for them to determine if there were any permanent injuries, a factual question, and when the jury so evidently found the trial Court castigates the jury verdict simply because his opinion or appraisal of this factual question was contrary.

All of this the Court of Appeals has refused to consider, merely approving the trial Court's invasion of the province of the jury and disapproving of the way in which the trial Court entered judgment. The Court of Appeals has by its refusal to consider this question spawned a legal consequence which the Supreme Court has repeatedly condemned. With this decision standing the Court of Appeals has approved what the trial Court did though not the manner in which it did it and in effect has said that no matter what invasion of the province of the jury the trial Court may make on motion for new trial they will not review his actions even though the case is properly before them for review.

PROCEEDINGS IN TRIAL COURT

This case in its simplest form in the trial Court presented only factual questions in controversy, questions about which reasonable minds could differ and therefore questions for the jury's determination. The trial Court in its charge submitted to the jury for their consideration the fact issue as to whether or not plaintiff had sustained a permanent disability (App. 86a). The respondent excepted to this submission by the trial Court without success (App. 87a). The jury returned a general verdict (App 88a) upon which judgment was entered (App. 89a). Thereafter, respondent, conceding liability, filed its motion for new trial again attacking the trial Court's submission of this factual issue to the jury (as to plaintiff's permanent disability) (App. 90a-93a) and the trial Court overruled this motion (App. 102a).

The trial Court then took it upon itself to reweigh the evidence ("Mr. May, the plaintiff in this case, sustained an injury which made a disc operation necessary but it would

be highly speculative to say he suffered a permanent disability.") (App. 103a), invade the province of the jury and withdraw from its consideration this factual question already decided by them and he then redetermined it. The trial Court entered its own judgment (App. 105a) vacating and setting aside the prior judgment entered on the jury verdict (App. 89a).

The Court of Appeals refused to consider what the trial Court did. It considered only the way in which the trial Court entered judgment (Appendix A hereto, pp. 43).

I. CONSTITUTIONAL RIGHT TO TRIAL BY JURY

A. DENIAL BY TRIAL COURT

The fundamental right to a trial by jury was considered by our forefathers so absolutely necessary to our judicial system that they would not ratify the Constitution of the United States until the so-called "Bill of Rights" was adopted. As a part of this "Bill of Rights" there is Amendment VII which reads as follows:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."
>
> Constitution of the United States
> Amendment VII

For a Court to invade the province of the jury and re-examine facts which have been tried by that jury otherwise than according to the rules of the common law is an unconstitutional invasion of a party's basic heritage. No Court has that right and it is the primary function of appel-

late Courts to guard, with jealous zeal, the constitutional rights of all people.

We say here that this constitutional guarantee of a jury trial has been denied to petitioner by the trial Court. That Court deprived the petitioner of his right to have the jury ascertain the damages to which he was entitled, which were unliquidated, and arbitrarily substituted its own judgment for that of the jury. The trial Court ascertained, not only the amount due petitioner, which is a fact question, but whether or not he had sustained a permanent disability, which is also a fact question. All of this after the trial Court had approved the jury verdict, said no new trial was necessary and said the jury had no improper motive.

This Court has many times said that where the facts are in dispute, and the evidence in relation to them is that from which fair-minded men may draw different inferences, the constitutionally appointed tribunal to decide these disputed questions of fact is the jury.

> Jones v. East Tenn. V & G R Co.,
> 128 U.S. 443, 32 L. Ed. 478, 9 S. Ct. 118;
> Washington & G R Co. v. McDade,
> 135 U.S. 554, 34 L. Ed. 235, 10 S. Ct. 1044;
> Tiller v. Atlantic Coast Line R. Co.,
> 318 U.S. 54, 87 L. Ed. 610, 63 S. Ct. 444.

The trial Court's predicate for its action—"The Court is constrained to say there must have been a misapprehension of the evidence by the jury on the injury and damage question" (App. 102a)—is completely contrary to the position of this Court as stated by Mr. Justice Holmes:

> "But it must be assumed that the Constitutional tribunal does its duty and finds facts only because they are proved."
>
> Aikens v. Wisconsin, 195 U.S. 194, 206,
> 49 L. Ed. 154, 160, 25 S. Ct. 3.

For the trial Court simply to say the jury verdict is excessive does not make it so — nor does his statement that there is no evidence of permanent injuries make it so; for the trial Judge's comment that the judgment was excessive because no permanent injury was shown is not supported by the uncontradicted testimony of the treating doctor that "I am not happy with a 25% permanent partial disability" (App. 61a); that regardless of any improvement from 25% he expected petitioner to have a permanent disability (App. 62a) which would likely be 10% to 15% (App. 61a) "if the physio-therapy is a success" (App. 53a) which it had not been in the past. Petitioner's recovery in this case is well supported by his proved detriment. This may have been a controverted issue and the jury might have disbelieved this uncontroverted evidence by the doctor; however, it is still a factual issue and the case did not compel the jury to disregard the evidence of permanent injury as the trial Court has done here on the motion for a new trial. The trial Court had submitted to the jury the question if there were permanent injuries on the same evidence which he later said showed no such injuries.

This interference with the jury's determination of damages was early condemned in the case of Barry v. Edmunds, 116 U. S. 550, 29 L. Ed. 729, 6 S. Ct. 501, 509 (1886) wherein a trial court dismissed a case, without submitting it to the jury, upon the ground that *in the Court's opinion the damages sought and allowable didn't equal the jurisdictional amount of the Court.* The Supreme Court of the United States in reversing stated:

> ". . . It adds, indeed, to the principal error, if any distinction can be made, that which consists in encroaching upon the province of the jury. For nothing is better settled than that, in such cases as the present, *and other actions for torts where no precise rule of*

> *law fixes the recoverable damages, it is the peculiar function of the jury to determine the amount by their verdict.* In Whipple v. Cumberland Mfg. Co., 2 Story 661, 670, Mr. Justice Story well expressed the rule on this subject that a verdict will not be set aside in a case of tort for excessive damages 'unless the Court can clearly see that the jury have committed some very gross and palpable error, or have acted under some improper bias, influence or prejudice, or have totally mistaken the rules of law by which the damages are to be regulated'—that is 'unless the verdict is so excessive or outrageous,' with reference to all the circumstances of the case, 'as to demonstrate that the jury have acted against the rules of law, or have suffered their passions, their prejudices, or their perverse disregard of justice to mislead them.' *In no case is it permissible for the Court to substitute itself for the jury, and compel a compliance on the part of the latter with its own view of the facts in evidence as the standard and measure of that justice which the jury itself is the appointed constitutional tribunal to award.*" (Emphasis supplied).

The trial Court specifically stated that there was no improper motive on the part of the jury and none was claimed by the respondent (App. 102a) and the Court did not find that the jury was unduly sympathetic for petitioner (App. 103a). The trial Court predicated its action by saying that in its view the size of the verdict alone showed prejudice on the part of the jury and that they must have acted under a misapprehension of the evidence. Certainly the record does not bear out the trial Court in its statement that the jury misapprehended the evidence for apparently this is based solely upon his view that "it would be highly speculative to say he suffered a permanent disability" (App. 103a) which is in itself a factual question for determination by the jury and the evidence in respect thereto is not subject to reweighing by the trial Court. The record

speaks for itself in this regard because the only medical testimony is by way of deposition. It is as easy for the Court of Appeals and the Supreme Court as it is for the trial Court to determine from this deposition whether or not there is sufficient evidence of a permanent disability to take that question of fact to the jury. Once it is determined that a controversy exists upon which reasonable minds may differ, as the trial Court so found, the power of the trial Court (or for that matter of any court) to reweigh this controversial question and decide it, is nonexistent; and, an exercise of such a power to reweigh the evidence will be struck down as unconstitutional by this Court. No other right is talked about more or so jealously guarded by this Court as the right to trial by jury of factual issues and this rightly so. Once we make inroads on this constitutional right we pave the way for jury decisions by judges.

B. COURT OF APPEALS REFUSED REVIEW

After the trial court had withdrawn this case from the jury and rendered judgment on its own determination of the facts, contrary to the jury verdict, petitioner appealed to the Court of Appeals presenting essentially two constitutional questions: (1) Does the trial Court have the right arbitrarily and without the consent of the petitioner to enter a remitted verdict; and (2) was the trial Court's action in invading the province of the jury by reweighing the evidence on the issue as to permanent injury a denial to petitioner of his constitutional right to trial by jury? Each of these questions arose under Amendment VII to the Constitution of the United States.

The Court of Appeals, in its judgment (Appendix A hereto, pp. 43), decided that the trial Court had no constitutional right to enter a remitted judgment after a jury

verdict and reversed the trial Court upon the authority of Kennon v. Gilmer, 131 U. S. 22, 33 L. Ed. 140, 9 S. Ct. 696 and Dimick v. Scheidt, 293 U. S. 474, 79 L. Ed. 603, 55 S. Ct. 296. However, it refused to consider and decide the issue raised as to the unconstitutional act of the trial Court in invading the province of the jury merely remanding the case to the trial Court for a reconsideration of the Motion for New Trial. The Court of Appeals thereby sanctioned the action of the trial Court in redetermining a fact issue and deprived petitioner not only his right to a jury trial as guaranteed by Amendment VII to the Constitution, but also denied him his only right to appeal.

The judgment entered was final, appealable and all questions were before the Court of Appeals (App. 105a). The testimony of Dr. Raskind (App. 44a-62a), the treating physician, who gave all the testimony with reference to the permanentness of the injuries sustained by petitioner, was by way of deposition and equally as reviewable by the Court of Appeals as by the trial Court.

> Am. Eagle Fire Ins. Co. v. Eagle Star Ins. Co., 216 F. 2d 176 (9th Cir. 1954);
> Galena Oaks Corp. v. Scofield, 218 F. 2d 217 (5th Cir. 1954).

The Court of Appeals has abdicated its function of review. Manifestly it serves no purpose to say that petitioner would have a right to have this issue determined eventually after any number of new trials when the entire case was before the Court who has as equal ability to consider deposition evidence as has the trial Court. Thus the Court of Appeals is paving the way for the lower Court to invade the province of the jury and reweigh the evidence in any case so long as it does so under the guise of offering a plaintiff the option of a new trial when the trial Court, not for any legal reason, but because of its own personal ideas, doesn't

agree with the jury verdict. And this on clear controverted issues of fact.

II. INVASION OF PROVINCE OF JURY

Where facts are controverted a jury question is presented and while it is for the trial Court to determine in the first instance what facts and circumstances are admissible and competent as evidence of the damages sustained, and whether sufficient facts have been introduced to present a jury question about which reasonable minds might differ, it is for the jury to determine the existence, nature, extent and permanency of the injuries suffered and to assess the amount to be allowed therefor. When the jury has returned its general verdict the trial Court may not substitute its judgment for that of the jury if there is substantial evidence to support the verdict. On motion for new trial because of alleged excessiveness of the jury verdict the trial Court's only function is to consider whether there is substantial evidence to sustain the amount of the verdict.

> Werthan Bag Corp. v. Agnew, 202 F. 2d 119, 123 (6th Cir. 1953).

Tennessee well states the effect of a general verdict of the jury in Thoni v. Hayborn, 37 Tenn. App. 56, 260 S.W. 2d 376 (1953):

> "Finally, defendants complain about the amount of the verdict and judgment. The jury returned a general verdict. The effect of such verdict in the case on trial was to decide each issue in favor of plaintiff if there was material evidence to support such verdict.
>
> "This principle applies to injuries suffered by plaintiff; that is, this Court must treat all injuries within the scope of the pleadings as established if any material evidence is introduced to prove such injuries."

The trial Court had no right to reweigh the evidence in

this case and decide that petitioner had sustained no permanent disability. It is not only contrary to the undisputed facts and evidence in this case, it is contrary to repeated decisions of the Supreme Court of the United States.

In the case of Baltimore & Carolina Line, Inc. v. Redman, (1935) 295 U. S. 654, 657, 55 S. Ct. 890, 891, 79 L. Ed. 1636 the Supreme Court stated:

> "The right of trial by jury thus preserved is the right which existed under the English common law when the Amendment was adopted . . ."
>
> "The aim of the Amendment, as this court has held, is to preserve the substance of the common-law right of trial by jury, as distinguished from mere matters of form or procedure, and particularly to retain the common-law distinction between the province of the court and that of the jury, whereby, in the absence of express or implied consent to the contrary, issues of law are to be resolved by the court and issues of fact are to be determined by the jury under appropriate instructions by the Court."

In the case of Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 67, 63 S. Ct. 444, 87 L. Ed. 610, 618 (1942) the Court was speaking of questions of disputed facts and said:

> ". . . Many years ago this Court said of problems of negligence, 'we see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others.' Jones v. Tennessee, V. & G. R. Co., 128 U. S. 443, 445, 43 L. Ed. 478, 479. Or as we have put it on another occasion, 'where the facts are in dispute, and the evidence in relation to them is that from which fair-minded men may draw different inferences', the case should go to the jury."

This is the same as to all questions of fact whether they

be issues of negligence or issues concerning injuries, their nature, extent and permanency.

Perhaps the case which is cited most frequently is the case of Tennant v. Peoria & P. U. R. Co., 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520 (1943). In that case a trial court had submitted the case to a jury which returned a verdict for the plaintiff. The 7th Circuit reversed the case holding that, while there was evidence of negligence (a factual question), there was no substantial proof that this negligence was the cause of plaintiff's decedent's death. The Supreme Court granted certiorari because of the important constitutional problems involved as to plaintiff's rights to a jury determination of the factual issue of causation. That Court stated:

> ". . . 'The essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked.' Galloway v. United States, 319 U. S. 327, 395; Atchison, T. & S. F. Ry. Co. v. Toops, 281 U. S. 351. If that requirement is met, as we believe it was in this case, the issues may properly be presented to the jury. *No Court is then justified in substituting its conclusion for those of the twelve jurors.*"
>
> 321 U. S. at p. 32 (Emphasis supplied)

In the same case it was again stated:

> "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws

the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. (Cases omitted). *That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored.* Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

id at 35 (Emphasis supplied)

In the case of Lavender v. Kurn, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916 (1946) the Court in discussing the function of the jury on questions of controverted facts stated:

"It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. *Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear.* But where, as here, there is evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, *it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."*

327 U. S. at page 653 (emphasis supplied)

This statement by the Supreme Court certainly has as equal application to the trial Court as to the Court of Appeals.

In the case of Ellis v. Union Pacific R. Co. 329 U. S. 649, 67 S. Ct. 598, 91 L. Ed. 572 (1947) the Court, in discussing

the evidence of negligence, and whether or not it was sufficient to go to the jury, stated:

> "*The choice of conflicting versions of the way the accident happened, the decision as to which witness was telling the truth, the inferences to be drawn from uncontroverted as well as controverted facts, are questions for the jury.* Tennant v. Peoria & P. U. R. Co., 321 U. S. 29; Lavender v. Kurn, 327 U. S. 645. Once there is a reasonable basis in the record for concluding that there was negligence which caused the injury, it is irrelevant that fair-minded men might reach a different conclusion. *For then it would be an invasion of the jury's function for an appellate court to draw contrary inferences or to conclude that a different conclusion would be more reasonable.* Lavender v. Kurn, supra (327 U. S. p. 652). And where, as here, the case turns on controverted facts and the credibility of witnesses, the case is peculiarly one for the jury. Washington & G. R. Co. v. McDade, 135 U. S. 554, 572; Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 68."
>
> 329 U. S. at page 653 (Emphasis supplied)

These statements too apply with equal force to trial courts as to appellate courts. Justice and the application of basic constitutional principles is not to be tested by the level of the forum in which the matter is heard. All are guided and bound by the same rules.

III. REMITTITUR PRACTICE AND TRIAL COURTS DISCRETION

It is difficult, if not impossible, to justify the practice of remittitur in view of the common law and Amendment VII to the Constitution of the United States. Perhaps if the question had been properly raised in an early case it would never have been sanctioned as constitutional in our judicial system.

> Dimick v. Schiedt, 293 U. S. 474, 79 L. Ed. 603, 55 S. Ct. 296.

Even though the remittitur practice has been accepted by the courts for many years it is well recognized that the trial Court has no right to arbitrarily remit verdicts. In proper cases trial Courts have in the past been permitted to exercise their discretion and cure admittedly excessive verdicts by remittitur. However, this is not an unlimited discretion. It is subject to review for abuse.

So. Ry. Co. v. Madden, (4th Cir. 1956) 235 F. 2d 198; Cert. den.
352 U. S. 953, 1 L. Ed. 2d 244, 77 S. Ct. 328;
Milprint, Inc. v. Donaldson Co., (8th Cir. 1955) 222 F. 2d 898;
Steiner v. U. S. (9th Cir. 1956) 229 F. 2d 745.

The trial Court in the case at bar stated there was no improper motive of the jury (App. 102a). In fact, the trial Court acted because of the size of the verdict alone, it being larger than he would have given sitting without a jury and because he reweighed the evidence and decided there was no permanent injury (App. 102a-104a).

The trial Court reduced the verdict of the jury in this case, not because there was any error of law, but because the Court, in its own determination of the facts, felt the jury awarded too much for the injuries. In other words the Court determined that the verdict was excessive per se and therefore reduced it. There was no dishonest motive on the part of the jury and none was claimed by appellee (App. 102a). The Court merely stated that in its opinion the jury must have been under a misapprehension of the evidence on the injury and damage question.

That this is a factual question and one for the determination of the jury there is no doubt. As was stated in the case of Pariser v. City of New York (2nd Cir. 1945), 146 F. 2d 431, 433:

". . . If the amount of the verdict be regarded as in fact excessive, nevertheless it was the jury's estimate arrived at after a proper charge. Such a matter is not reviewable on appeal but is solely one of fact for the jury to determine. (Cases omitted)."

As is stated by the Court in the case of Cole v. Chicago, St. P. M. & O. Ry. Co., 59 F. Supp. 443, 446 (D.C.D. Minn. 1945):

"I am constrained to add that the power of the Court to set aside or reduce a verdict on the ground that it is excessive should be used with extreme caution. *Generally such action would result merely in a substitution of the opinion of the Court for that of the jury; in other words it ordinarily would be an invasion of the function of the jury by the Court and a denial of trial by jury.* Courts should respect the verdict of juries and not disturb them except in extreme cases and under rare circumstances. A verdict should not be set aside merely because it is excessive in the mind of the Court but only when it is so grossly excessive as to shock the Court's sense of justice and the impropriety of allowing it to stand is obvious . . ." (Emphasis supplied).

The question has been very ably discussed in the case of Jones v. Atlantic Refining Co., 55 F. Supp. 17, 19 (D.C.E.D. Pa. 1944) where the Court stated:

"Courts have, and sometimes exercise the power to set aside verdicts on the ground of excessiveness, yet it is a power to be cautiously used. Brown v. Evans, C.C. 17 F. 912, affirmed Evans v. Brown, 109 U. S. 180, 3 S. Ct. 83, 27 L. Ed. 898. Courts in general are most reluctant to disturb a jury's verdict on the ground of excessiveness where the damages are unliquidated and there is no fixed measure of mathematical certainty. This is particularly significant with respect to damages in tort actions for personal injuries. Armit v. Loveland, 3 Cir., 115 F. 2d 308, 314. The texts and authorities are consistent in holding that a verdict of the jury

will not be set aside as excessive unless it is clearly shown that the jury either disregarded the instructions of the Court or was influenced by passion, prejudice or corruption, or other improper motives. 'Of the various formulæ that have been allowed by the Courts for the determination of the question whether a verdict is excessive, the following one, employed by Chancellor Kent, in a libel case has been frequently quoted or paraphrased with approval in passing upon objections to verdicts as being excessive: "The damages, therefore, must be so excessive as as to strike mankind, at first blush, as being, beyond all measure, unreasonable, and outrageous, and such as manifestly show the jury to have been actuated by passion, partiality, prejudice or corruption. In short, the damages must be flagrantly outrageous and extravagant, or the Court cannot undertake to draw the line; for they have no standard by which to ascertain the excess." The formula which is perhaps most frequently used is to the effect that to warrant interference the verdict must be so excessive as to appear to have been given under the influence of passion or prejudice.' 15 Am. Jur. 623. A verdict should not be set aside simply because it is excessive, in the mind of the Court, but only when it is so grossly excessive as to shock the Court's sense of justice, and the impropriety of allowing it to stand is manifest. (Cases omitted.) *When there is any margin for a reasonable difference of opinion in the matter, the view of the Court should yield to the verdict of the jury, rather than the contrary.* Smith v. Pittsburgh & W. R. Co., C.C. 90 F. 783. The Court must respect the verdict of the jury in fact as well as in pretense or theory and must not interfere or substitute its own judgment for that of the jurors, for to do so would violate a constitutional privilege to have the fair verdict of the jury and not the fair judgment of the Court. However it may be expressed by a Court, summarized, the rule is, that the trial judge will not interfere with a jury's verdict simply because it is greater than his own estimate; only where the verdict is so grossly excessive as

to shock the conscience of the Court and clearly manifest that it was the result of caprice, passion, partiality, prejudice, corruption or other improper motives, will the Court intervene; and the theory always is that a Court will not set aside a verdict on this ground in an action of this character except in extreme and exceptional cases." (Emphasis supplied).

The essential holding of all these cases is that excessiveness per se is not a ground of remittitur unless it can be said that the amount awarded was so great as to strike all mankind immediately as being unreasonable. Not merely excessive to the trial Judge's views or the respondents' views. To be excessive the verdict must exceed the largest amount which any qualified jury acting reasonably would award. If reasonable men could have done so, the jury has functioned properly and improper influence may not be inferred by the trial Judge merely from the size of the verdict.

Tennessee Coal & Railroad v. Roddy, 85 Tenn. 400 (1887).

A review of verdicts in similar cases does not usually provide much help for it is the evidence of loss in each case which must govern the range of amounts which a reasonable jury could return. As to size alone, however, we invite the Court to examine any similar case and see the range of verdicts approved. For example $75,500 was approved for a man with a similar injury having two discs removed from his back and yet he was earning only about half what petitioner was earning and had a shorter life expectancy. Widder v. N. Y., Chi. & St. L. Ry., 142 F. Supp. 830. Fifty-five Thousand ($55,000) Dollars was approved for a man with the same life expectancy and loss of earning capacity in a similar type injury in Constentine v. A. & S. R. Co. 144 F. Supp. 39. Could we in truth say then, as the trial Court here has said, that this verdict is mon-

strous when in fact reasonable juries for years over the nation have given much larger verdicts for smaller losses?

Surely a reasonable jury in the case at bar could have awarded less or more than the $42,500 awarded to petitioner on the proof in this case where the uncontradicted testimony of the only doctor introduced said he had a 25% disability which he hoped to reduce to as low as 10% but had not been able to do. Upon loss of earning capacity alone without consideration of other admitted reasonable items of damage he would be entitled to a verdict between $83,565 and $33,433 upon undisputed earnings of $9110 annually and a 36.7 year's life expectancy (App. 74a). Size alone does not make a verdict excessive.

> Heavy Haulers v. Jones, ... Okla ...., 304 P. 2d 292 (1956).

IV. REVIEW OF REMITTED VERDICT

A. SUPERVISORY POWER OF SUPREME COURT

This Court has on repeated occasions exercised its broad powers of supervision over the lower Federal Courts where the interests of justice require it.

> Gibson v. Lockheed Aircraft Service, Inc., 350 U. S. 356, 100 L. Ed. 395, 76 S. Ct. 366;
> United States v. Minsingwear, 340 U. S. 36, 95 L. Ed. 36, 71 S. Ct. 104;
> Walling v. Reuter, 321 U. S. 671, 88 L. Ed. 1001, 64 S. Ct. 826;
> Supreme Court Rule 19(1)(b).
> Title 28 United States Code, Section 2106.

In the exercise of this supervision the Supreme Court and the Court of Appeals may reinstate a judgment for the plaintiff entered on a jury verdict which the trial Court has erroneously vacated and set aside.

Skelley v. New York, N. H. & Hartford R. Co., 93 F. 2d 479 (2nd Cir. 1938).

This is not a case brought merely for a review of facts. The case has been presented to and decided by a jury and the trial Court with the sanction of the Court of Appeals, states that a new trial is not necessary; however, the trial Court has so far exceeded his authority as to deprive petitioner of his constitutional rights. This case presents a question which strikes at the very roots of our jury system. How far may a trial Court go on a Motion for a New Trial in reviewing the jury verdict for the plaintiff? May the Court of Appeals ignore the unconstitutional acts of the trial Court?

The admonition of the Supreme Court to Appellate Courts in Federal Employees Liability Act cases is well taken here —that judges are not on the bench to substitute their ideas of negligence, and extent of injury if you please, for the ideas of the jury.

Rogers v. Missouri Pacific R. R., (U.S.), 77 S. Ct. 443 (1957).

The criterion governing the exercise of the Supreme Court's discretion in granting or denying certiorari is based upon whether the jury function in passing on disputed questions of fact and in drawing inferences from proven facts has been respected.

Wilkerson v. McCarthy, 336 U. S. 53, 55, 70, 93 L. Ed. 497, 69 S. Ct. 413 (1949).

Review will be granted where the issue to be decided is fundamental to the case.

Land v. Dollar, 330 U. S. 731, 91 L. Ed. 1209, 67 S. Ct. 1009;
U. S. v. General Motors Corp., 323 U. S. 373, 89 L. Ed. 311, 65 S. Ct. 357;
Aetna Cas. Co. v. Flowers, 330 U. S. 464, 91 L. Ed. 1074, 67 S. Ct. 798.

On writ of certiorari the Supreme Court can dispose of all questions arising on the record.

Donovan v. Pa. Co., 199 U. S. 279,
50 L. Ed. 192, 26 S. Ct. 91.

The Supreme Court will direct the disposition which should have been made in the Court of Appeals.

Story Parchment Co. v. Paterson Parchment Paper Co., 282 U. S. 555, 75 L. Ed. 544, 51 S. Ct. 248.

It is the intention of the Federal Rules of Civil Procedure to prevent extended litigation and retrial of issues already determined. Even on remand the Court of Appeals should have limited a retrial, if necessary, to the issue of damages only.

Federal Rules of Civil Procedure,
Rule 59, Title 28 United States Code, Rule 59.
Gasoline Products v. Champlin Refining Co.
283 U. S. 494, 75 L. Ed. 1188, 51 S. Ct. 513;
Thompson v. Camp, 167 F. 2d., 733 (6th Cir. 1948).

The use of the Motion for New Trial is to aid trial Judges in the performance of their judicial duties; but, the exercise of the trial Judge's discretion in the matter of a new trial is not to displace the jury which is the trier of facts submitted to it. The exceptional circumstances in the instant case warrant the use of the supervisory power of the Supreme Court of the United States to restore the judgment entered on the jury's verdict (App. 89a). To do otherwise would mean the rules of procedure for trial by jury have been practically nullified by the District Judge.

Supervisory control of the District Court when there is a clear abuse of discretion and an invasion of the historic rights of the jury is necessary to protect judicial administration in the Federal system.

The discretion of a District Judge is not so elastic that

the District Judge is the sole judge of its elasticity, for litigants in damage suits are entitled to trial by jury and the discretion of the trial Judge in ordering a remittitur or in granting a new trial is not so elastic as to permit him in his discretion to substitute his verdict for the verdict of the jury.

B. ABUSE OF DISCRETION BY TRIAL COURT

Not only has the trial Judge unconstitutionally invaded the province of the jury here, but in addition he has abused any discretionary control he might have over the size of a jury verdict. As stated before an abuse of discretion is considered an error of law and reviewable on appeal.

Spero-Nelson v. Brown, 175 F. 2d 86
(6th Cir. 1949);
Sebring Truck Co. v. White, 187 F. 2d 486
(6th Cir. 1951);
Reisberg v. Welters, 111 F. 2d 595
(6th Cir. 1940);
Cases cited 6 Moore's Federal Practice
(2d. Ed.), pg. 3836 et seq.

We submit that this is a case where the trial Court has abused its discretion in reducing the jury verdict. In fact, the trial Court here did not exercise any discretion because it not only invaded the province of the jury and usurped its functions, but it went beyond the proof in its entry of a verdict. If the trial Court reduced the verdict because it found there was no permanent disability, then it invaded the province of the jury by taking this issue from them and re-weighed the evidence in respect to it. On the other hand, if the trial Court re-weighed the evidence and found a permanent disability different from that of the jury, it usurped the function of the jury as the trier of fact. Let us analyze the action of the trial Court in regard to the evidence in the record.

If the rule of remittitur, as applied in Federal Courts, is to reduce the verdict of the jury to the lowest amount that could reasonably be found by the jury (as the rule appears to be in Wisconsin - Meissner vs. Papas, E. D. Wis. 1940, 35 F. Supp. 676; Aff'd 7th Cir. 1941, 124 F. 2d 720) then the lowest verdict which would reasonably appear under the proof in this case which the jury could find would be $34,677.00 without allowing anything for (1) medical expenses at the time of trial, (2) future medical expenses, (3) past pain and suffering, (4) future pain and suffering, and (5) lost wages up to the time of trial. Giving the plaintiff-petitioner all favorable inferences from the evidence, as we must on a motion for a new trial brought by the defendant-respondent, this would base the verdict on a 10% loss of earning capacity or permanent disability, which is the lowest percentage of permanent disability that the jury could accept and it would be speculative to say that petitioner would improve this much from his present physical condition.

In this situation the trial Court has abused any discretion it might have because it has reduced the verdict below even this minimum figure which a jury could find from the evidence.

On the other hand, if the rule of remittitur in the Federal Court is to reduce the verdict only to the maximum amount that a reasonable jury could find from the evidence (as appears to be the majority rule as shown in International Paper Co. v. Busby, 5th Cir. 1950, 182 F. 2d 790, 793; Yurkonis v. Delaware L. and W. R. Co., E. D. N. Y. 1914, 213 Federal 537, 538; Aff'd 2d Cir. 1915, 220 F. 429; Aff'd 1915, 238 U. S. 439, 35 S. Ct. 902, 59 L. Ed. 1397; and other cases cited in Volume 6 of Moore's Federal Practice, 2nd Edition, page 3744, beginning notes 27 et seq), then this trial Court has abused its discretion for if the jury believed from the

evidence, which they might very readily have done, that plaintiff would continue to have a 25% disability which Dr. Raskind testified that he had at the time of trial, he had a loss of earning capacity alone which would amount to approximately $83,630.00 which would not include (1) medical expenses prior to the trial, (2) medical expenses at the time of the trial, (3) future medical expenses, (4) past pain and suffering, (5) future pain and suffering, and (6) loss of wages at the time of trial.

V. IS THIS VERDICT IN FACT EXCESSIVE?

A. PROCEEDINGS

The jury in this case returned a verdict for the petitioner for personal injuries assessing his damages at $42,500 (App. 88a). Upon this verdict of the jury judgment was entered (App. 89a). The trial Court vacated and set aside this verdict of the jury and the judgment entered thereon and entered its own judgment for $25,000 (App. 105a) because the trial Court redetermined an issue of fact as to whether or not petitioner's injuries were permanent.

B. PETITIONER'S INJURIES PERMANENT

The record does not support the trial Judge's interference with the jury verdict. The determination of whether petitioner sustained a permanent injury is for the jury to decide and the record supports the submission of this issue to the jury.

In this case, the only medical evidence introduced upon the issue of the permanency of the injury sustained by the plaintiff-petitioner, was the evidence introduced on behalf of the petitioner. This evidence was not contradicted by the respondent, even though respondent had requested that the petitioner be examined by Dr. Nicholas Gotten, a very

well known neuro-surgeon of Memphis, Tennessee, to whom the petitioner went without objection. The respondent had the petitioner examined by Dr. Gotten and yet did not produce him at the trial to testify. (App. 36a). This was for the obvious reason that he would have supported petitioner's evidence of permanent disability.

> "It is true that where a party has it within its power to produce a witness who was in position to know the facts, and was apparently favorable to him, his failure to call such witness affords an inference that the testimony of the witness would not support his contentions. This rule has been applied in numerous cases by our Supreme Court and by this court. . . ."
>
> Waller v. Skeleton, 31 Tenn. App. 103, 212 S. W. 2d 690; 697 (1948);
>
> See also White v. Seier, 37 Tenn. App. 437, 264 S.W. 2d 241 (1953).

We also call to the Court's attention: (1) that the trial Judge charged the jury that in their consideration of damages to be awarded to plaintiff-petitioner, they might consider and determine whether or not he suffered any permanent disability (App. 86a); (2) the trial court refused to withdraw from the jury's consideration this question of fact as to permanent disability when the Court was requested to do so by the respondent (App. 87a-88a); (3) the respondent in its motion for a new trial alleged error on the part of the trial court because it instructed the jury that they might assess damages for permanent disability if they found such and, further, that the trial Court erred in failing to withdraw this issue from the jury (App. 90a-93a); and all of these grounds in respondent's motion were overruled by the trial Court (App. 102a).

What is the uncontradicted and undisputed medical proof in this record which shows the permanency of the injuries of the respondent?

Bear in mind that the respondent had suffered an injury to his lower lumbar back which required the surgical removal of a centrally protruded intervertebral disc at the L-4 inter-space and, also, a protrusion of the intervertebral disc at the L-5 inter-space, with compression of the S-1 nerve root on the left (App. 45a). Respondent admits this is a substantial injury and petitoner is entitled to substantial damages (App. 96a).

Dr Raskind testified:

"Q. Doctor, you did remove two discs, did you not?

"A. Yes, he had a very definite central protrusion of the disc at the L-4 inter-space and L-5 inter-space."

* * * * *

"Q. Did you have to put Mr. May back in traction after surgery?

"A. No, not since surgery, but the 9th of this month (March 1956) he was put back in the hospital for some further physio-therapy. He had too much post-operative back irritability and I was trying to reduce that.

"Q. Since the operation, have you seen Mr. May?

"A. Yes, I saw him on January 6th and again on March 6th (1956).

"Q. Doctor, state whether or not he has received the relief you had expected he would?

"A. No, he has not received the relief I expected; he has more back irritability than he should have following disc removal." (App. 52a-53a).

* * * * *

"Q. Can you give us an estimate of the disability which Mr. May has sustained as a result of this injury?

"A. I would say *currently on the basis of restricted motion of the lumbar spine and pain on certain activities, his disability is 25% of the body as a whole*, and *if* the physio-therapy is a success, his degree

of disability should be less at the conclusion of the physio-therapy.

"Q. Doctor, what criterion do you use to measure this percentage of disability?

"A. The low back has a range of 90 degrees flexion, 15 to 20 to 25 degrees lateral and currently his restriction is approximately 50%. I also took into consideration the muscle spasm and segmentation. He has no leg signs at the present time and *his disability is based on the malfunction of the back which in my opinion, currently is 25% of the body as a whole.*" (App. 53a-54a) (Emphasis supplied).

• • • • •

On cross-examination Dr Raskind said:

"Q. Doctor, is it true you expect *some* improvement as time goes by?

"A. We will put it this way, *I am not happy with a 25% permanent partial disability.* I *usually* do better than that, *usually it is* 10% *to* 15% and sometimes even better than that, and that is the reason I have him in the hospital and am still working with him." (App. 61a) (Emphasis Supplied).

• • • • •

"Q. Doctor, in this particular case, *do you expect Mr. May to have some eventual permanent partial residual disability?*

"A. Yes; I would say being overweight to start with and *having the difficulty he has already had, I do not expect him to make a complete recovery.*" (App. 62a) (Emphasis supplied).

The plain undisputed evidence in this case is that petitioner has a permanent partial disability presently of 25% of the body as a whole. Dr. Raskind says that *if* the physio-therapy is a success his degree of disability *should be less.* He does not say that it will be. He also states in response to the respondent's cross-examination that he is not happy

with *the 25% permanent partial disability;* that he *usually does better than that, usually it is 10% to 15%*. He does not attempt to say that he will get a better result than 25% permanent partial disability and the reason is obvious. The plaintiff-petitioner had *more back irritability after the operation than is normal* and that is why he had to put him back in the hospital for further treatment. (App. 61a).

To state, as the trial Judge did, that it would be highly speculative to say that petitioner had any permanent disability, is to completely contradict this undisputed testimony, not with evidence in the record, but by the Court's own determination.

C. THIS VERDICT IS NOT EXCESSIVE

This verdict is certainly not excessive. In fact on the proof in this record it is a small verdict. Not only the substantial evidence but all the evidence in the record supports this verdict.

The trial Court properly charged the jury the elements they could consider in reaching their verdict including whether petitioner's injuries were permanent and whether petitioner had or would sustain a loss of earning capacity (App. 85a-86a).

The jury is also entitled to take into consideration in determining its verdict inflation, the high cost of living and the decreased purchasing power of the dollar.

> Wesco Paving Co. v. Nash, 35 Tenn. App. 409, 245 S.W. 2d 782;
> Foster Creighton Co. v. Hale, 32 Tenn. App. 208, 222 S.W. 2d 222;
> Waller v. Skeleton, 31 Tenn. App. 103, 212 S.W. 2d 690.

Respondent notes that petitioner would be entitled to substantial damages on the proof in the record (App. 96a).

Respondent does not question the fact that petitioner suffered extreme physical pain and mental anguish which commenced at the time of injury and continued to the date of trial some nine months later. Respondent does not question the fact that this pain and suffering will continue in the future. There is no dispute or contradiction that petitioner was in the hospital from August 12 through August 24, 1955, for treatment by traction; that he was in the hospital from September 1 through September 10, 1955; that on September 2 a myelogram was performed on him with its attendant pain and discomfort (like having a football needle up his back he states); that he was in the hospital for the third time from November 29 through December 10, 1955; that on November 30 he was operated on for the surgical removal of two (2) herniated intervertebral discs with all its attendant pain and misery; that he was back in the hospital March 9, 1956, and stayed through the trial of this case (and according to Dr. Raskind he would be there for ten to fourteen days).

It is not disputed nor does the respondent attempt to contradict the fact that petitioner has continued to have a very irritable back, his pain and suffering being severe after the operation (App. 52a). Petitioner has not received the relief that Dr. Raskind expected after the operation and has had more back irritability than he should have following the removal of these two herniated discs (App. 53a).

There is no dispute and no contradictory proof is offered that petitioner has presently a 25% permanent disability (App. 53a). It is suggested that this 25% permanent disability may improve IF the physio-therapy is successful (which it has not been in the past). The improvement, if any, may only leave him with a residual permanent partial disability of 15% (App. 61a). Dr. Raskind states, however, and his testimony is not contradicted, that he does not ex-

pect a complete recovery in this case (App. 62a). It is further to be noted that the respondent, at its own request, had petitioner examined by Dr. Nicholas Gotten. The respondent did not see fit to introduce Dr. Gotten or secure his testimony before the Court and jury when his testimony was readily available. Surely, if Dr. Gotten could have helped respondent, its attorney would have had him testify.

Petitioner had medical bills up to January 6, 1956, amounting to $1,225.04 which did not include the expenses for his medical care and treatment while in the hospital during the trial of this case and thereafter (App. 74a); and he was scheduled to go through the same processes again. This easily covers $2500.00 of any damages awarded.

There is no dispute in this record that petitioners' earnings for 1955, based mostly upon work which he did prior to July 13, 1955, the date of the accident, were $9,115.00. There is no dispute that for the past three years his earnings have increased on the average of 15% each year (App. 20a-21a).

There is no dispute nor any attempted contradiction of the testimony of John Flagg, Financial Manager of Graybar Electric Co., Inc., that the sales records of all the salesmen in this district for Graybar have been *up* in 1956 over 1955 with the exception of petitioner, whose production record has continued to decrease and that for the first two months of 1956 his record is down 10% under 1955; and that Graybar has had to put another salesman into Charlie May's territory to pick up his volume (App. 68a-69a). Petitioner's income is based on his sales production and volume and he has already lost 10% of this.

There is no dispute nor contradiction by the respondent that the evidence in this case shows clearly that Charlie

May cannot now do the things he used to do at home, at work and in outside activities; and the evidence all shows that this condition is permanent.

There is no dispute that Charlie May tried hard to keep on with his work but he has lost over three and a half months time from work since his accident in July 1955. The plaintiff is entitled to recover from the jury for lost wages, if the jury finds he lost wages. This is substantial evidence supporting over $2600.00 of the jury's verdict.

> Railroad v. Porter, 117 Tenn. 13, 94 S. W. 666;
> Majestic v. L&N, 147 F. 2d 621 (6th Cir. 1945)

So we have a well man made sick and lame by the negligence of the defendant. The fact that petitioner was seriously injured and is now seriously injured has been shown to exist by uncontradicted and substantial proof and this fact of petitioner's condition will continue to exist until the contrary is shown; and the burden of proving facts to the contrary is upon the respondent, which has offered no such evidence, but relies wholly upon the hopes of Dr. Raskind that he can reduce petitioner's permanent disability from 25% to 10-15% and not upon his performance to do so.

The proof is that petitioner, Charlie May, a young man of 28 years with a wife and three young children, and with a future life expectancy stipulated to be 36.7 years, had achieved an enviable and responsible position with Graybar Electric Co. Inc.; their top salesman in this entire district and with every opportunity to advance in the Company both financially and in position; that the position he had attained and his future advancement depended upon his constant activity, his aggressiveness, his ability to get out of the offiice and keep customer contacts, and his doing night work; and his earnings were completely dependent upon his volume of sales, his production for the Company.

He cannot now do what is required of him to maintain his attained position, much less increase his position and production, and as a result of the injuries he has sustained his production has already dropped more than 10%. His permanent physical impairment will not only reduce his present earning level, but will prevent him in the future from increasing his present earning level as he had been doing each year in the past.

The record in this case shows that Charlie May lost over three (3) months from his work which at his prior earnings amounts to $2277.00. When this amount is subtracted from the $40,000.00 you leave $37,773.00.

It is undisputed and clearly shown by the substantial evidence in this case that Charlie May has presently a 25% disability.

The loss of earning capacity of 25% disability upon the amount of earnings shown for 1955 ($9115 x 25% x 36.7 years) makes a loss of earning capacity of $83,639.30.

If, for purposes of argument, we assume that petitioner's permanent disability may decrease in the future, which is contrary to law and is highly improbable after this length of time and all the treatment he has had, it might decrease to 15% and at this percentage of permanent disability his loss of earning capacity is ($9115 x 15% x 36.7 years) making $50,158.90.

These two amounts do not take into consideration the fact that he probably would have had *increased earnings* in the future over the $9115 had he not been injured.

These amounts do not take into account the pain and suffering which he went through in the past by virtue of the hospital stays, the myelogram, the operation and the physiotherapy.

These amounts certainly do not take into consideration the pain, suffering and mental anguish which he will have in the future, and the lack of ability to do those things in the future which he was able to do in the past. A strong, unblemished body vigorous and alert and free from pain is dear to Charlie May; and his constitutional rights to have his damages assessed by a jury cannot be ignored by some theoretical speculation that he will improve in health and have no permanent disability when the proof in the record is completely to the contrary.

In this record the substantial evidence would warrant the jury in returning a verdict for Charlie May, petitioner, substantially in excess of what has been returned. The jury has not nearly compensated him for his loss of earning capacity, his pain and suffering and the permanent nature of his injuries.

We first respectfully submit that the general verdict of the jury in this case was not only not excessive, but that in fact from the substantial proof in this case it hardly compensates him for the injuries inflicted upon him by the negligence of the respondent.

Second; we submit that the trial court has unconstitutionally invaded the province of the jury, redetermined facts which they are the constitutionally appointed tribunal to determine and has deprived petitioner of his constitutional right to trial by jury as guaranteed to him by Amendment VII to the Constitution of the United States.

Thirdly, we submit that the Court of Appeals, in refusing to review this constitutional issue, has abdicated its function as an appellate court of review, sanctioned the action of the trial Court in invading the province of the jury and permitted the petitioner to be deprived of his constitutional right to trial by jury by the trial Court.

It is respectfully submitted that the questions presented by petitioner are substantial and of public importance and that grave questions of constitutional rights are raised; that the verdict of the jury rendered in this case (App. 88a) should be restored and the judgment entered thereon should be reinstated (App. 89a).

Respectfully submitted,

CLARENCE CLIFTON

JOHN B. MACK

1814 Exchange Building
Memphis 3, Tennessee
Counsel for Petitioner,
Charlie E. May

CERTIFICATE OF SERVICE

I, Clarence Clifton, a member of the bar of the Supreme Court of the United States and of counsel for the petitioner in the above entitled case, hereby certify that on this day I served true and correct copies of the foregoing petition for writ of certiorari on Ferber S. Floyd, counsel for respondent, by depositing the same in the United States mails properly addressed to him at his address in the Columbian Mutual Tower Building, Memphis, Tennessee, with proper postage prepaid.

This 15th day of May, 1957.

CLARENCE CLIFTON

1814 Exchange Building
Memphis, Tennessee

APPENDIX A.

TO JURISDICTIONAL STATEMENT

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED MARCH 6, 1957 (FORMAL PARTS OMITTED)

BEFORE

HON. JOHN D. MARTIN, SHACKELFORD MILLER AND POTTER STEWART

CIRCUIT JUDGES

JUDGMENT

In a suit for personal injuries arising from an automobile accident, appellant was awarded a jury verdict of $42,500. On motion for a new trial, the district court entered judgment for $25,000 without obtaining the consent of appellant, concluding that in view of the testimony on the extent of injury the "verdict was so excessive as to shock the conscience of the Court." There is no question under these circumstances that the trial judge had the discretionary power to order a new trial, but the district court committed error by reducing the verdict without giving appellant the option of either accepting a remittitur or of having a new trial. *Kennon* v. *Gilmer*, 131 U. S. 22, 27-30 (1889); *Dimick* v. *Schiedt*, 293 U. S. 474, 482-85 (1935).

Upon remand the district court will have the power either to grant or deny a new trial generally or to deny a new trial on the condition that appellant accept a judgment for a lesser amount than the jury verdict.

The judgment is set aside and the case is remanded to the district court for reconsideration of the motion for a new trial.

APPENDIX B.

TO JURISDICTIONAL STATEMENT

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE, WESTERN DIVISION OVERRULING MOTION FOR NEW TRIAL, DIRECTING REMITTITUR AND ENTERING FINAL JUDGMENT. FILED MAY 8, 1956 (FORMAL PARTS OMITTED)

ORDER OVERRULING MOTION FOR NEW TRIAL AND DIRECTING REMITTITUR AND FINAL JUDGMENT

This cause came on to be heard on Friday, May 4, 1956, upon a motion for a new trial duly filed herein by the defendant, Ellis Trucking Co., Inc., upon briefs, and upon arguments of counsel in open Court, and upon the entire record in this cause, from all of which it is Considered, Ordered and Adjudged by the Court:

A motion for a new trial is overruled except with respect to Paragraphs III and IV.

The Order heretofore entered on the jury's verdict awarding judgment against the defendant, Ellis Trucking Co., Inc. for $42,500.00 is hereby vacated and set aside.

A new trial will not be necessary in this case and it is here ordered that the jury's verdict be reduced to $25,000.00.

It is now ordered that on the verdict of the jury rendered herein, the plaintiff, Charlie E. May, have and recover of the defendant, Ellis Trucking Co., Inc., the sum of $25,000.00 as compensatory damages for personal injuries and the sum of $1110.00 as property damages, all with interest at

the rate of six (6%) per cent annum from March 16, 1956, and all the costs of this cause for which plaintiff shall have execution, to all of which action of the Court plaintiff duly excepted and his exceptions are here noted by the Court.

The opinion of the Court is here made a part of the record in this cause.

This 8th day of May, 1956.

MARION S. BOYD,
Judge

Office Supreme Court, U.S.
FILED
JUN 23 1957
JOHN T. FEY, Clerk

No. ~~1053~~. 160

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1956

CHARLIE E. MAY,
Petitioner,

vs.

ELLIS TRUCKING COMPANY, INC.,
Respondent.

Petition for Writ of Certiorari to Review the Judgment of the United States Court of Appeals for the Sixth Circuit.

BRIEF

Of Respondent in Opposition to the Petition for Certiorari.

L. E. GWINN,
725 Columbian Mutual Tower,
Memphis, Tennessee,
Attorney for Respondent.

NELSON, NORVELL and FLOYD,
1001 Columbian Mutual Tower,
Memphis, Tennessee,
(Of Counsel).

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 1-4477

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No. 1053.

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Respondent.

Petition for Writ of Certiorari to Review the Judgment of the United States Court of Appeals for the Sixth Circuit.

BRIEF

Of Respondent in Opposition to the Petition for Certiorari.

OPINIONS BELOW.

The opinion of the trial court overruling petitioner's motion for a new trial appears at pages 102a-104a of the Appendix in this case.

The order of the court overruling the motion for a new trial and directing a remittitur appears at page 105a of the Appendix and is set out at pages 44 and 45 of the Petition for Writ of Certiorari in this cause.

The Court of Appeals did not render a written opinion in the case but rendered the following judgment, which is set out at page 43 of the Petition for Certiorari, and reads as follows:

> "In a suit for personal injuries arising from an automobile accident, appellant was awarded a jury verdict of $42,500. On motion for a new trial, the district court entered judgment for $25,000 without obtaining the consent of appellant, concluding that in view of the testimony on the extent of injury the 'verdict was so excessive as to shock the conscience of the court.' There is no question under these circumstances that the trial judge had the discretionary power to order a new trial, but the district court committed error by reducing the verdict without giving appellant the option of either accepting a remittitur or of having a new trial. **Kennon v. Gilmer**, 131 U. S. 22, 27-30 (1889); **Dimick v. Schiedt**, 293 U. S. 474, 482-85 (1935).
>
> "Upon remand the district court will have the power either to grant or deny a new trial generally or to deny a new trial on the condition that appellant accept a judgment for a lesser amount than the jury verdict.
>
> "The judgment is set aside and the case is remanded to the district court for reconsideration of the motion for a new trial."

JURISDICTION.

Jurisdiction is apparently invoked by Petitioner under United States Code Title 18, Section 1254 (1) and under the provisions of Supreme Court Rule 19 (1) (b).

Jurisdiction in the trial court was founded upon diversity of citizenship, Petitioner and Respondent being citizens and domiciled in different states and the amount in controversy exceeding, exclusive of interest and costs, the sum of $3,000 (Title 28, U. S. Code, Sec. 1332).

STATEMENT OF THE CASE.

The complaint filed in the United States District Court for the Western District of Tennessee alleged common law and statutory negligence, including a violation of Memphis City Ordinances, and claimed damages in the sum of $75,000 (App. 8a) for personal injuries, and property damages in an additional and separate sum of $3,000 (App. 12a).

Respondent answered, admitting the diversity of citizenship, alleging that Petitioner had a policy of collision insurance and setting out that he collected a claim thereunder of $857.50, and denying all other allegations of the complaint and asking that it be dismissed (App. 13a, 14a).

Petitioner, plaintiff below, thereafter sought and obtained leave to amend the complaint and increased the demand for compensatory damages to $100,000 (App. 15a, 16a, 17a).

After a trial lasting several days the jury returned a verdict in favor of Petitioner and against the Respondent, Ellis Trucking Co., Inc., and assessed personal injury damages in the amount of $42,500 and property damages in the sum of $1,100 (App. 88a).

Respondent duly filed a motion for a new trial and on a consideration thereof the same was overruled except as to grounds III and IV, which read as follows:

> "III. The verdict of the jury is excessive."
>
> "IV. The verdict of the jury is so excessive as to evince passion, prejudice or unaccountable caprice on the part of the jury."

In sustaining these grounds of the motion, the court said:

> "A new trial will not be necessary in this case, but in the court's opinion the jury's appraisal of the damages was so manifestly excessive that the court is

bound in the interest of justice to order that the excessive portion of it be remitted. This was a monstrous verdict. * * * Certainly there was no rational appraisal of the evidence on the question of damages in the light of what would be reasonable for the injury involved. * * * The forty-two thousand five hundred dollar verdict was so excessive as to shock the conscience of the court. * * *

"Now the right of the court to revise a jury verdict is a delicate one, and one this court is always slow to exercise, but justice requires that course in this case. We don't know, and it would be speculative to say, on what definite basis the jury arrived at such a verdict, but it was certainly not on the evidence the court heard during the trial. * * * At any rate, it was so excessive as to evince passion, prejudice and caprice on the jury's part, and the court's duty in the matter is very plain" (App. 102a-103a).

"The court regrets the necessity of saying so, but under the evidence, that is, the substantial evidence in the case, it is the court's view that this verdict should be reduced to twenty-five thousand dollars. After this reduction, it is still a very large verdict" (App. 104a).

TRIAL JUDGE HAS DISCRETIONARY POWER TO ORDER A NEW TRIAL.

The Court of Appeals, in reversing the case, recognized the established rule that the trial judge has the discretionary power to order a new trial, but held that it was error to reduce the verdict "without giving appellant an opportunity of either accepting a remittitur or of having a new trial. **Kennon v. Gilmer**, 131 U. S. 22, 27-30; **Dimick v. Schiedt**, 293 U. S. 474, 482-485."

It also held that upon remand the district court would have the power either to grant a new trial generally or of denying a new trial on condition that appellant accept

a judgment for a lesser amount than the jury's verdict. On this point, we quote from the decision of this Court in **Kennon v. Gilmer**, 132 U. S. 22, which, after stating that it had no authority to pass upon any question of fact involved in the consideration of the motion for a new trial, held as follows:

> "The erroneous judgment of the Supreme Court of the Territory being reversed, the case will stand as if no such judgment had been entered; and that Court will be at liberty, in disposing of the motion for a new trial, according to its view of the evidence either to deny or to grant a new trial generally, or to order judgment for a less sum than the amount of the verdict, conditional upon a remittitur by the plaintiff."

Under Rule 59 of the Federal Rules of Civil Procedure the trial judge is authorized to grant a new trial for any of the reasons for which new trials had theretofore been granted in actions at law, and for any of the reasons for which new hearings had theretofore been granted in suits in equity in the courts of the United States.

Under Rule 59 (d), the Court, of its own initiative, may order a new trial for any reason for which it might have granted a new trial on motion of a party, and the order shall specify the grounds therefor (Barron & Holtzoff, Federal Practice & Procedure, Sec. 1302).

In fact, it is not only the power but the duty of the judge who is not satisfied with the verdict of a jury, to set the verdict aside and grant a new trial. **Aetna Casualty & Surety Co. v. Yeatts**, 4th Circuit, 122 F. 2d 350.

It is well settled that the granting or refusing of a new trial is a matter resting in the sound discretion of the trial judge, and that his action thereon is not reviewable upon appeal save in the most exceptional circumstances. **Montgomery Ward & Company v. Duncan**, 311 U. S. 243; **Fairmont Glassworks v. Cub Four Coal Co.**, 287 U. S. 474.

Had the trial judge set aside the judgment and granted a new trial, his action in so doing would not have been reviewable under the facts in this case, but he reduced the verdict instead of granting a new trial, conditional upon a remittitur by the plaintiff.

It is clear of doubt that the respondent was entitled to a new trial, which petitioner could have avoided by treating the reduction made by the judge as a remittitur. Failing to do that, he had no right to complain of the action of the Court of Appeals in remanding the case.

No ground for certiorari is set forth in the petition. The lengthy petition (45 pages in length) fails to state a single reason why the writ of certiorari should be granted.

Its argument (pages 9-26) would be more appropriate before a jury than the Supreme Court; moreover, it directly challenges the well-established remittitur practice in Federal Courts (pages 21-22 of the Petition).

The Petition for Certiorari does not point out any conflict in decisions of the different circuits or any violation of an applicable decision of this court, nor does it present with accuracy, brevity and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration as required by Rule 23 of this Court.

It is, therefore, respectfully submitted that the Petition should be denied.

L. E. GWINN,
725 Columbian Mutual Tower,
Memphis, Tennessee,
Attorney for Respondent.

NELSON, NORVELL and FLOYD,
1001 Columbian Mutual Tower,
Memphis Tennessee,
(Of Counsel).